Supreme Court, U.S.
FILED

10-835 DEC 22 2010

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No.

In the
Supreme Court of the United States

KEVIN TUCKER,

Petitioner,

v.

JOHN CASON, WARDEN,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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December 22, 2010

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QUESTION PRESENTED

Whether defense counsel was ineffective under the Sixth Amendment, where he failed to obtain the medical records from the complaining witness's automobile accident, which resulted in pelvic injuries that could have accounted for the medical findings in this case, and where he failed to have the prosecution's medical report and the photographs taken during the medical examination of the complainant reviewed by another doctors, which would have provided an alternative explanation for her injuries.

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REFERENCE TO DECISIONS BELOW

The August 30, 2010 decision of the Sixth Circuit Court of Appeals, reversing the District Court for the Eastern District of Michigan, is unpublished. Kevin Tucker v. John Cason, (No. 07-2481, 6th Cir. 2010). That Court's opinion denying rehearing and rehearing en banc is dated October 20, 2010. The Opinion of the District Court for the Eastern District of Michigan's, conditionally granting habeas relief, is also unpublished (No. 03-10254, E.D. Mich. 2007).

STATEMENT OF THE BASIS OF JURISDICTION

This is an appeal following the district court's Opinion and Order granting habeas relief in the Eastern District of Michigan. The Sixth Circuit Court of Appeals reversed the district court in an opinion dated August 30, 2010 and, on October 20, 2010, denied a petition for rehearing and rehearing *en banc*. The jurisdiction of this Court arises from 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

U.S. CONST. amend. VI:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to

have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

STATEMENT OF THE CASE

This case concerns the improper application by the Sixth Circuit Court of Appeals of Strickland v. Washington, 466 U.S. 668 (1984). The Sixth Circuit reversed the District Court, which had granted habeas relief, on the grounds that Mr. Tucker's right to the effective assistance of counsel was denied where trial counsel did not obtain medical records of the complainant, Mr. Tucker's daughter. The medical records showed that the daughter had serious pelvic injuries and extensive medical treatment, arising from an automobile accident, which could have explained the findings of the prosecution's examining physician that her injuries "could be" consistent with sexual abuse. Trial counsel did not obtain a second medical opinion regarding the validity of the prosecution doctor's report. Had he done so, the jury would have heard that the complainant had a perfectly normal anus, with no injuries at all.

The medical records would also have shown that the girl's vagina was either normal, or that, if it was abnormal, the abnormalities were consistent with the extent of her pelvic injuries and the invasiveness of her medical treatment administered to her during her two month hospitalization following the automobile accident.

The jury heard none of this because defense counsel had not bothered to obtain the medical records. Instead, he questioned the prosecution's medical

expert about the injuries she sustained in the auto-accident, and the witness agreed it would be important to know about those injuries, but he had not seen the records. In closing argument, defense counsel argued that the injuries could have been sustained in the automobile accident, and the prosecutor responded in rebuttal that defense counsel could have, but did not, obtain the medical records.

REASON FOR GRANTING THE WRIT

THE SIXTH CIRCUIT'S DECISION VIOLATED THIS COURT'S DECISION IN STRICKLAND V. WASHINGTON, 466 U.S. 668 (1984), WHERE DEFENSE COUNSEL FAILED TO OBTAIN THE MEDICAL RECORDS FROM THE COMPLAINING WITNESS'S AUTOMOBILE ACCIDENT, WHICH RESULTED IN PELVIC INJURIES THAT COULD HAVE ACCOUNTED FOR THE MEDICAL FINDINGS IN THIS CASE, AND WHERE HE FAILED TO HAVE THE PROSECUTION'S MEDICAL REPORT AND THE PHOTOGRAPHS TAKEN DURING THE MEDICAL EXAMINATION OF THE COMPLAINANT REVIEWED BY ANOTHER DOCTOR, WHICH WOULD HAVE PROVIDED AN ALTERNATE EXPLANATION FOR HER INJURIES.

Kevin Tucker was convicted of sexual assault against his young daughter. The charges arose three years after the assault supposedly happened and after a contentious divorce and custody dispute between the girl's parents. The case was extremely close, with the jury sending out many notes and receiving an Allen charge when the jurors announced they were deadlocked. The jury ultimately convicted Mr. Tucker

of three counts alleging anal penetration and acquitted him of one count alleging vaginal penetration.

The girl was examined by a doctor for the prosecution, who found injuries to the girl's vagina and anus which "could be" consistent with sexual abuse. The jury never heard evidence of her pelvic and vaginal injuries or the medical treatment which resulted from a serious automobile accident, and which could have provided an alternate explanation for the medical findings. Although defense counsel admitted that he knew of the auto accident from the commencement of his representation, he did not obtain her medical records or otherwise investigate the auto accident.

On appeal, the Michigan Court of Appeals evaluated the claim of ineffective assistance, and rejected it, because, even if defense counsel obtained the medical records, it would not have "eliminated the possibility" that Mr. Tucker committed the crimes. The Michigan Supreme Court denied leave to appeal.

On habeas review, the District Court for the Eastern District of Michigan granted relief, finding that the state court used the wrong standard of review under Strickland v. Washington, 466 U.S. 668 (1984), and finding that counsel's failure to obtain the records constituted both deficient performance and prejudice.

The Court of Appeals agreed that the Michigan Court of Appeals used the wrong test under Strickland, but reversed the district court's decision, without finding that defense counsel provided deficient performance, because the Court of Appeals found that Mr. Tucker did not show that counsel prejudiced the

defense. The Court of Appeals concluded that because the jury acquitted Mr. Tucker of the charge of vaginal penetration, and convicted him of three counts of anal penetration, evidence of the injuries from the auto accident "would not likely have resulted in a more favorable outcome for Tucker."

The Sixth Circuit agreed that the testimony of Dr. Stephen Guertin, an expert in child sexual abuse who looked at all of the complainant's medical records after the conviction, found that the complainant had a "perfectly normal" anus. The Court of Appeals held that Dr. Guertin's testimony would have undermined the State's theory as to when the abuse occurred, but the medical records would not have countered the prosecution's medical evidence that the injuries were from abuse, and not from the accident. This ignores Dr. Guertin's opinion that no anal injuries existed. It also ignores the testimony of the prosecution's medical expert, who testified that the so-called injuries "could be" consistent with sexual abuse. It also disregards the prosecution expert's testimony that she did not view all of the daughter's medical records, and that it would be important to do so. Finally, the Sixth Circuit held "there was little to refute" because the testimony of anal injuries was "brief". This decision misconstrues this Court's Strickland standards.

The Sixth Amendment to the United States Constitution guarantees the accused the right to the effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Strickland sets forth a two-part test for assessing claims of ineffective assistance: (1) did the attorney make errors "so serious that counsel was not functioning as the 'counsel' guaranteed by the Sixth

Amendment," Strickland, 466 U.S. at 687, and (2) was the defendant prejudiced? To meet the prejudice standard, a "defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, supra, 466 U.S. at 694.

The failure to investigate potential evidence for the defense is unreasonable where the attorney fails to investigate his options to make a reasonable choice among them, Strickland, supra; Combs v. Coyle, 205 F3d 269, 288 (6th Cir. 2000). Where defense counsel's pretrial investigation is not thorough, his strategic decisions are entitled to less deference, White v. McAninch, 235 F3d 988, 995-996 (6th Cir. 2000).

This Court has consistently held that an inadequate investigation by defense counsel may result in a Strickland violation. In Sears v. Upton, ___ U.S. ___, 130 S.Ct. 3259, 3265-66 (2010), the Court stated:

> There are two errors in the state court's analysis of Sears' Sixth Amendment claim. First, the court curtailed a more probing prejudice inquiry because it placed undue reliance on the assumed reasonableness of counsel's mitigation theory. The court's determination that counsel had conducted a constitutionally deficient mitigation investigation, should have, at the very least, called into question the reasonableness of this theory. Cf. *Wiggins* v. *Smith*, 539 U.S. 510, 522, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003)

(explaining that "counsel's failure to uncover and present voluminous mitigating evidence at sentencing could not be justified as a tactical decision ... because counsel had not 'fulfill[ed] their obligation to conduct a thorough investigation of the defendant's background' " (quoting *Williams* v. *Taylor*, 529 U.S. 362, 396, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000); alteration in original)). And, more to the point, that a theory might be reasonable, in the abstract, does not obviate the need to analyze whether counsel's failure to conduct an adequate mitigation investigation before arriving at this particular theory prejudiced Sears. The "reasonableness" of counsel's theory was, at this stage in the inquiry, beside the point: Sears might be prejudiced by his counsel's failures, whether his haphazard choice was reasonable or not.

* * *

Second, and more fundamentally, the court failed to apply the proper prejudice inquiry. We have never limited the prejudice inquiry under *Strickland* to cases in which there was only "little or no mitigation evidence" presented, App. to Pet. for Cert. 30B. True, we have considered cases involving such circumstances, and we have explained that there is no prejudice when the new mitigating evidence "would barely have altered the sentencing profile presented" to the decisionmaker, *Strickland*, *supra,* at 700, 104 S.Ct. 2052. But we also have found deficiency *and* prejudice in other cases in which counsel presented what

> could be described as a superficially reasonable mitigation theory during the penalty phase. *E.g.*, *Williams*, *supra*, at 398, 120 S.Ct. 1495 (remorse and cooperation with police); *Rompilla* v. *Beard*, 545 U.S. 374, 378, 125 S.Ct. 2456, 162 L.Ed.2d 360 (2005) (residual doubt). We did so most recently in *Porter* v. *McCollum*, 558 U.S. ___, ___, 130 S.Ct. 447, 449, __ L.Ed.2d __ (2009) *(per curiam)*, where counsel at trial had attempted to blame his client's bad acts on his drunkenness, and had failed to discover significant mitigation evidence relating to his client's heroic military service and substantial mental health difficulties that came to light only during postconviction relief, *id.*, at 453-54. Not only did we find prejudice in *Porter*, but-bound by deference owed under 28 U.S.C. § 2254(d)(1)-we also concluded the state court had *unreasonably* applied *Strickland*'s prejudice prong when it analyzed Porter's claim. *Porter*, *supra*, at ___, 130 S.Ct., at 454-55.

And in Rompilla v. Beard, 545 U.S. 374, 382-83, 125 S.Ct. 2456 (2005), the Court stated:

> Before us, trial counsel and the Commonwealth respond to these unexplored possibilities by emphasizing this Court's recognition that the duty to investigate does not force defense lawyers to scour the globe on the off chance something will turn up; reasonably diligent counsel may draw a line when they have good reason to think further investigation would be a waste. See *Wiggins* v. *Smith*, 539 U.S., at 525, 123 S.Ct. 2527 (further investigation excusable where counsel has evidence suggesting it would

> be fruitless); *Strickland* v. *Washington*, *supra*, at 699, 104 S.Ct. 2052 (counsel could "reasonably surmise ... that character and psychological evidence would be of little help"); *Burger* v. *Kemp*, 483 U.S. 776, 794, 107 S.Ct. 3114, 97 L.Ed.2d 638 (1987) (limited investigation reasonable because all witnesses brought to counsel's attention provided predominantly harmful information). The Commonwealth argues that the information trial counsel gathered from Rompilla and the other sources gave them sound reason to think it would have been pointless to spend time and money on the additional investigation espoused by postconviction counsel, and we can say that there is room for debate about trial counsel's obligation to follow at least some of those potential lines of enquiry. There is no need to say more, however, for a further point is clear and dispositive: the lawyers were deficient in failing to examine the court file on Rompilla's prior conviction.

The Courts of Appeals have closely followed Strickland in holding that strategic choices made after a thorough investigation are virtually unassailable. 466 U.S. at 687. However, it is clear that "counsel must, at a minimum, conduct a reasonable investigation enabling him to make informed decisions about how best to represent his client." Sanders v. Ratelle, 21 F.3d 1446, 1456 (9th Cir. 1994). "Ineffectiveness is generally clear in the context of complete failure to investigate because counsel can hardly be said to have made a strategic choice when [he or she] has not yet obtained the facts on which such a decision could be made." Id. at 1457; see also

Hendricks v. Vasquez, 974 F.2d 1099, 1109 (9th Cir. 1992); United States v. Burrows, 872 F.2d 915, 918 (9th Cir. 1989); Evans v. Lewis, 855 F.2d 631, 637 (9th Cir. 1988). "[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." Strickland, 466 U.S. at 691.

> Pretrial investigation, principally because it provides a basis upon which most of the defense case must rest, is, perhaps, the most critical stage of a lawyer's preparation. ... [E]ffective representation, consistent with the sixth amendment, also involves the "independent duty to investigate and prepare."

House v. Balkcom, 725 F.2d 608, 617-618 (11th Cir. 1984) (citations omitted). "[E]ven if [the attorney's] decision could be considered one of strategy, that does not rend it immune from attack -- it must be a *reasonable* strategy", Jones v. Wood, 114 F.3d 1002, 1010-11 (9th Cir. 1997) (emphasis supplied). Trial counsel's performance may be deemed deficient for the failure to investigate and present witnesses who may testify in a manner favorable to the defendant. Workman v. Tate, 957 F.2d 1339, 1345 (6th Cir. 1992). "It is only after a full investigation of all the mitigating circumstances that counsel can make an informed, tactical decision about which information would be most helpful to the client's case." Pickens v. Lockhart, 714 F.2d 1455, 1467 (8th Cir. 1983).

The effective assistance of counsel includes the right to effective assistance from medical or psychiatric experts as to issues which arise in a case. For at least thirty years, authorities have stressed

repeatedly the particularly critical interrelation between expert psychiatric assistance and minimally effective representation of counsel." United States v. Edwards, 488 F.2d 1154, 1163 (5th Cir. 1974); United States v. Fessel, 531 F.2d 1275, 1279 (5th Cir. 1976); Beavers v. Balkcom, 636 F.2d 114, 115 (5th Cir. 1981). Consequently, in Beavers, the court held that counsel should have followed up on information concerning the defendant's mental illness by subpoenaing hospital records and by talking personally to hospital staff. See also Greer v. Beto, 379 F.2d 923, 925 (5th Cir. 1967) (failure to submit medical evidence to jury); and Mauldin v. Wainwright, 723 F.2d 799, 800 (11th Cir. 1984) (failure to review hospital records, failure to call psychiatric expert). Commonwealth v. Alvarez, 433 Mass. 93, 740 N.E.2d 610 (Mass. 2000) (failure to provide medical records to defense expert); Profitt v. Waldron, 831 F.2d 1245, 1249 (5th Cir. 1987)(failure to procure medical records); Guzman v. State, 260 Ga. App. 689, 580 S.E.2d 654 (Ga. App. 2003). In Guzman, as here, counsel failed to investigate Guzman's medical condition, he failed to subpoena records thereon, or seek expert review of the medical records in his possession:

> Because Guzman's medical condition was his *only* defense and was fully made known to trial counsel in detail pretrial, and medical records given to counsel pretrial corroborated and supported this defense, counsel had a duty to investigate Guzman's medical condition in order to put forward a medical defense on Guzman's behalf. The *complete* failure to do so was error. Id.

Throughout trial in this case, defense counsel raised the issue that the daughter's injuries could have been caused by the automobile accident. He did this despite his utter failure to investigate the pertinent medical records. The prosecutor responded at trial by correctly pointing out that the defense had the same subpoena powers as the prosecution.

At the evidentiary hearing in state court, trial counsel testified that although he did not retain a doctor to review Dr. Inocencio's report and photographs, he wrote letters to two doctors, Dr. Goldsmith and Dr. Guertin, and, when he did not hear from them, he assumed they had nothing helpful to offer the defense. He spoke on the phone with a third doctor, who was unhelpful. This constituted the sum of his efforts to have another doctor review the prosecution witness's findings.

Had counsel retained another doctor, he would have received a medical opinion which criticized the prosecution "expert's" findings, and found that the pelvic examination of the complainant was essentially normal, with the possible exception of narrowing at the vagina, and that could have been caused by the automobile accident or sexual abuse. Instead, the jury in this case heard only testimony which the prosecution's doctor attributed to sexual abuse. Those findings are suspect for a number of reasons, among them the failure to take a history from the complainant and the doctor's ignorance of the true nature of the vaginal injuries sustained in the auto accident, as well as the doctor's findings that anal injuries occurred where they were actually nonexistent.

The failure to obtain the records, and a second medical opinion, is evident from defense counsel's opening statement, where defense counsel stated that, "it would appear, I think, from those reports [of Dr. Inocencio] it's only fair to say that something happened to this young lady. That there was a physical abuse, sexual abuse. And I think you're going to find that that's what the doctor is going to testify to" (Tr. 9/29/00 12-13). Defense counsel's failure to obtain a second opinion resulted in the concession that sexual abuse had occurred, leaving only the identity of the perpetrator at issue, resulting in obvious prejudice to Mr. Tucker.[1] He also assumed the prosecution's doctor, Dr. Norma Inocencio, had taken a history when she conducted her examination of the child, which she had not. At trial, trial counsel cross examined the medical doctor who testified from Dr. Inocencio's report about the impact the auto accident injuries could have had on Dr. Inocencio's findings, without the medical records themselves, and he admitted that the prosecutor argued in closing arguments that Mr. Bain could have obtained the records.

The deficiencies of trial counsel's performance and the prejudice to Mr. Tucker are evident from the deposition of Dr. Stephen Guertin, an expert whose testimony was admitted at the post-conviction hearing held in state court.

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[1] At the evidentiary hearing held in state court, trial counsel and Mr. Tucker's family members disagreed as to whether trial counsel was specifically informed that the girl's injuries from the auto accident included vaginal bleeding. There is no disagreement that he knew early on about the accident or that she was in a lengthy coma and suffered serious injuries.

Dr. Guertin testified, based on the prosecution witness's report and photographs, that the examination of AT was essentially normal – that is, her anus was normal and her hymen was normal, except for an area of narrowing, and that the area of possible abnormality could have been caused by the physical examination and medical procedures from the auto accident.

This critical defense evidence existed, was available to defense counsel, and in fact was discussed at trial. The trial transcripts show that in opening statements, the prosecutor referred to the medical evidence, stating, "And, obviously, I've spoken to that doctor and his conclusion is going to be that he believes there is sexual abuse involved. But I'm just going to leave him to give you the details and why".

During the cross examination of the daughter and Dr. Eastman (a doctor who did not examine the complainant but who reviewed the report of Dr. Inocencio, who conducted the examination, and who testified to that report at trial), defense counsel asked about the seriousness of the auto accident and whether those injuries could have significance to the medical findings; he agreed, but had not seen the records.

In closing arguments, the prosecutor emphasized the medical report. In rebuttal, the prosecutor argued in response to defense counsel's closing argument that it would have been important to look at the medical reports from the accident, that the medical report corroborated the sexual assault, and the "defense has the exact same subpoena powers as the prosecution as you can tell, because they called witnesses as well, and there was not one doctor that got on the stand that

said when AT was in this car accident she was penetrated by something. There is no evidence to say that. The only evidence to say she was penetrated is the evidence of AT's testimony that said she was penetrated by her father sexually. To go from there to some sort of car accident mishap is a quantum leap that the jury should not make."

In Tucker v. Prelesnik, 181 F.3d 747 (6th Cir. 1999), the Sixth Circuit found ineffective assistance where the trial attorney had failed to procure medical records which would have impeached the testimony of the complaining witness in an assault case. Like the present case, the prosecutor's case in Tucker rested on the complainant's credibility. The Court stated:

> "The same is true of Mr. Tucker's trial counsel's failure to obtain Anthony Henderson's medical records prior to trial and to use the records to impeach Mr. Henderson. To the extent that Mr. Henderson's medical records could be used to demonstrate that his memory concerning the assault was faulty, particularly when considered together with evidence of his varying versions of the assault, counsel's failure to obtain those records could not have been part of a sound trial strategy." 181 F.3d at 756.

The Court also held that the second prong of Strickland – prejudice – was satisfied under the "reasonable probability" standard, where "the only evidence linking the defendant to the crime is the victim's testimony." Tucker, 181 F.3d at 757. Under Strickland, "counsel has a duty to make reasonable investigations or to make a reasonable decision that

makes particular investigations unnecessary." 466 U.S. at 691, 104 S.Ct. at 2066.

The upshot is this: counsel knew these records existed and yet did not bother to obtain them, because he did not think they were relevant. He made that determination without having examined the records, which cannot be considered sound trial strategy. Counsel's failure to procure, examine and produce the hospital medical records fell below an objective standard of reasonableness, and was "outside the wide range of professionally competent assistance." Strickland, 466 U.S. at 690. Had the records been presented to the jury, there is more than a reasonable probability that Mr. Tucker would have been acquitted of all charges. As it stands, there can simply be no confidence in the reliability of the guilty verdicts which the jury rendered.

The trial court held that defense counsel's performance was not deficient because he did not specifically know that the girl had suffered pelvic injuries in the automobile accident. The Michigan Court of Appeals affirmed, on the same grounds. That court acknowledged that trial counsel would have performed deficiently if he knew of the pelvic injuries.

The district court correctly held that the standard for assessing counsel's performance is not what he knew, but also what he reasonable should have known had he conducted a reasonable investigation. Counsel cannot rely solely on the information he has in his possession. Tactical choices are reasonable only to the extent they are based on a reasonable investigation. To fail to investigate and obtain the medical records, and then to conduct a trial without the records, while

repeatedly informing the jury of their importance, is not sound strategy.

CONCLUSION

Mr. Tucker requests that this Court grant this petition for a writ of certiorari or, in the alternative, reverse the decision of the Sixth Circuit Court of Appeals.

Respectfully submitted,

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DATED: December 22, 2010

APPENDIX

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APPENDIX A

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 07-2481

[Filed August 30, 2010]

KEVIN TUCKER,	)
	)
Petitioner-Appellee,	)
	)
v.	)
	)
JOHN CASON, Warden,	)
	)
Respondent-Appellant.	)
	)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN

Before: SILER and GIBBONS, Circuit Judges; REEVES, District Judge.*

* The Honorable Danny C. Reeves, United States District Judge for the Eastern District of Kentucky, sitting by designation.

DANNY C. REEVES, District Judge. Respondent-appellant John Cason appeals the district court's conditional grant of petitioner-appellee Kevin Tucker's petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. For the following reasons, we reverse the district court's decision.

I.

Tucker was charged with four counts of first-degree criminal sexual conduct involving his daughter, AT. The State alleged penile/oral penetration, penile/anal penetration, foreign object/anal penetration, and penile/vaginal penetration.[1] The acts were alleged to have occurred sometime in the summer of 1996, when AT was five years old, shortly before Tucker and AT were involved in a serious automobile accident.

Tucker was tried before a jury in Macomb County Circuit Court. At trial, AT testified that she and her father were home by themselves watching television when he instructed her to remove her clothes. She complied, and he removed his own clothes. Next, according to AT, Tucker put his penis in her vagina, anus, and mouth. He then "shoved" the eraser end of a pencil "up [her] private."

Dr. Jay Eastman, a pediatrician specializing in the examination of child abuse victims, testified as an expert for the prosecution. He had not examined AT but had reviewed a report prepared by Dr. Norma

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[1] Although the State initially charged penile/vaginal penetration, the fourth count presented to the jury was digital/vaginal penetration.

Inocencio following her examination of AT in October 1999, after the abuse allegations came to light. Dr. Eastman testified that Dr. Inocencio's findings of irregularities in AT's hymen and anus were "compatible with sexual abuse." On cross-examination, defense counsel asked Dr. Eastman if he was aware that AT had been in a serious accident. Dr. Eastman responded that he knew about the accident and believed AT had suffered a broken leg, but he was unsure of her other injuries. Dr. Eastman acknowledged that medical records from the accident might be significant for purposes of a sexual-abuse examination if, for example, the accident had involved "a penetrating injury to the vagina."

In fact, AT sustained extensive pelvic injuries in the accident, which occurred in mid-August 1996. Further, AT experienced vaginal bleeding as a result of her injuries. To determine the cause of the bleeding, doctors performed manual explorations of her vagina, as well as a vaginoscopy. These procedures entailed the insertion of a finger or medical instrument across AT's hymen into her vagina, which could have resulted in hymenal trauma. However, this information was not presented to the jury, presumably because defense counsel had not obtained AT's medical records from the accident.

Nevertheless, during closing arguments, Tucker's attorney noted Dr. Inocencio's failure to review those records:

> And you will remember the testimony regarding the fact that [AT] had had a serious accident. And I asked the doctor, did you review — actually I asked him did the doctor who wrote

> the report review the accident reports or the medical reports? And the answer was there is no indication in that report that those reports had been reviewed. And I suggest to you might that not be important to review reports? Do we know that something of that nature didn't happen during the course of the accident?

In rebuttal, the prosecution argued:

> Now, defense attempts to show about how the victim was in a serious car accident so maybe something in that car accident may have caused her hymen to be missing and deep anal fissures. Well, I'm not certain what kind of car accident that would be, however, defense has the exact same subpoena powers as the prosecution as you can tell, because they called witnesses as well, and there was not one doctor that got on that stand that said when [AT] was in this car accident she was penetrated by something. There is no evidence to say that. The only evidence to say that she was penetrated is the evidence of [AT]'s testimony that said she was penetrated by her father sexually. To go from there to some sort of car accident mishap is a quantum leap that this jury should not make.

The jury convicted Tucker on the first three counts but found him not guilty of digital/vaginal penetration. Tucker received concurrent sentences of 85 to 240 months of incarceration on each count. He moved for an evidentiary hearing and a new trial, arguing that his counsel was ineffective because he had not obtained AT's medical records from the car accident. The court granted Tucker's request for an evidentiary

hearing. Among the witnesses who testified at the hearing was Dr. Inocencio, who had since reviewed AT's emergency-room records from the accident.[2] The pertinent portions of Dr. Inocencio's testimony are discussed below.

Following the hearing, the trial court determined that defense counsel's failure to obtain the medical records was not objectively unreasonable, and Tucker's motion for a new trial was denied. Tucker appealed his convictions to the Michigan Court of Appeals, asserting four grounds for relief. The only claim relevant for present purposes alleged various deficiencies in his trial counsel's performance, including the failure to obtain AT's medical records from the accident.

The state court of appeals affirmed Tucker's convictions in an unpublished per curiam decision. *People v. Tucker*, No. 232094, 2003 Mich. App. LEXIS 563 (Mich. Ct. App., Mar. 4, 2003). Tucker then filed an application for leave to appeal in the Michigan Supreme Court. However, the application was denied. *People v. Tucker*, 469 Mich. 903, 669 N.W.2d 816 (2003). In October 2003, Tucker filed the subject petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254, raising the same four claims for relief asserted in his direct appeal.

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[2] AT was treated at Mount Clemens General Hospital immediately following the accident. She was then transferred to Children's Hospital, where she remained for approximately two months. Dr. Inocencio reviewed only the Mount Clemens records.

The district court found merit in Tucker's ineffective-assistance claim with respect to his counsel's failure to obtain the medical records. The court thus conditionally granted habeas relief, ordering that Tucker be released unless the State elected to retry him on the underlying charges within seventy days. *Tucker v. Cason*, No. 03-10254, 2007 U.S. Dist. LEXIS 78329, at *66 (E.D. Mich., Oct. 23, 2007). This appeal followed.[3] The district court granted the respondent's motion to stay and Tucker's request for release on bond. On November 29, 2007, Tucker was released on a $50,000 bond pending resolution of the appeal.

II.

A district court's decision to grant a habeas petition is subject to de novo review. *Murphy v. Ohio*, 551 F.3d 485, 493 (6th Cir. 2009). Because Tucker's petition was filed after the effective date of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 ("AEDPA"), that statute's provisions apply. *See Murphy*, 551 F.3d at 493. AEDPA permits federal courts to grant habeas relief with

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[3] Tucker also filed a Notice of Appeal, cross-appealing from those portions of the district court's October 2007 Opinion and Order that were adverse to him. Tucker's cross-appeal, No. 0810, was consolidated with the instant case. However, this Court found that Tucker had abandoned three of his claims for relief and ultimately denied a certificate of appealability with regard to the remainder of his ineffective-assistance claim. As a result, the only issue currently before this panel is whether the district court properly granted habeas relief based on defense counsel's failure to obtain AT's medical records from the auto accident.

respect to claims previously adjudicated on the merits in state court only if the state court adjudication,

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d).

A state-court decision falls under the "contrary to" clause of § 2254(d)(1) "if the state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law or if the state court decides a case differently than [the Supreme] Court has on a set of materially indistinguishable facts." *Williams v. Taylor*, 529 U.S. 362, 413 (2000). A decision is also contrary to clearly established federal law "if the state court applies a rule that contradicts the governing law set forth in [Supreme Court] cases." *Id.* at 405. Likewise, habeas relief is appropriate under the "unreasonable application" clause if the state court "identifies the correct governing legal principle from [the Supreme] Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." *Id.* For purposes of the "unreasonable application" clause, it is not enough that a federal habeas court finds the state court's application of federal law to be erroneous or incorrect. Instead, the

application must be objectively unreasonable. *Id.* at 409-12.

To prevail on a claim of ineffective assistance of counsel, a habeas petitioner must establish that the state court's decision was contrary to, or involved an unreasonable application of, the two-part test set forth in *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Under *Strickland*, a defendant must first establish "that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* The second prong of the *Strickland* inquiry is whether the defendant was prejudiced by his attorney's deficient performance. *Id.* To satisfy the prejudice requirement, a "defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694. If the defendant suffered no prejudice as a result of his attorney's performance, it

is irrelevant whether that performance was deficient.[4] *Id.* at 697.

Although the state court's decision must be consistent with Supreme Court precedent, the state court need not cite or even be aware of applicable Supreme Court cases, "so long as neither the reasoning nor the result of the state-court decision contradicts them." *Early v. Packer*, 537 U.S. 3, 8 (2002). However, a decision is contrary to clearly established federal law where the state court recites the *Strickland* test but applies a more demanding burden of proof to the prejudice inquiry. *Fulcher v. Motley*, 444 F.3d 791, 799 (6th Cir. 2006) (citing *Williams*, 529 U.S. at 405-06). In such cases, we review the merits of the ineffective-assistance claim de novo, unconstrained by § 2254(d). *Id.* (citing *Williams*, 529 U.S. at 406).

Here, the state appeals court did not cite *Strickland* but recognized the two-prong test set forth in that decision: "A successful claim of ineffective assistance of counsel requires a defendant to 'show that counsel's performance was deficient and that there is a reasonable probability that, but for the

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[4] The Supreme Court, recognizing that this will often be the case, has instructed that "there is no reason" to address the performance aspect first "or even to address both components of the inquiry if the defendant makes an insufficient showing on one." *Strickland*, 466 U.S. at 697; *see also Baze v. Parker*, 371 F.3d 310, 321 (6th Cir. 2004) (finding it unnecessary to address the issue of attorney competence where the defendant could show no prejudice from counsel's arguably deficient performance). Thus, because we find no reasonable probability that the outcome of Tucker's trial would have been different but for his attorney's failure to obtain the medical records, we need not evaluate counsel's performance.

deficiency, the factfinder would not have convicted the defendant.'" *Tucker*, 2003 Mich. App. LEXIS 563, at *5 (quoting *People v. Snider*, 239 Mich. App. 393, 423-24, 608 N.W.2d 502 (2000)).[5] Nevertheless, the court ultimately applied a stricter standard for assessing prejudice:

> Moreover, we note that developing the possibility that the accident could have resulted in physical conditions resembling those commonly associated with sexual abuse would only have presented an alternative explanation for the complainant's physical condition. It would not have eliminated the possibility of sexual penetration, nor would it have called into question the victim's compelling testimony against defendant. Accordingly, we cannot conclude that, but for trial counsel's failure to refute the prosecution's expert testimony, defendant would not have been convicted. Consequently, we reject defendant's contention that counsel was ineffective as to this issue.

Id. at *13-*14 (internal citations omitted).

As the district court correctly noted, "[t]he standard for determining prejudice is not whether effective advocacy would have 'eliminated the possibility' that the defendant committed the crime or that the petitioner 'would not have been convicted.'" Rather, Tucker was merely required to show a reasonable

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[5] In *Snider*, the Michigan Court of Appeals cited *People v. Pickens*, 446 Mich. 298, 312, 521 N.W.2d 797 (Mich. 1994), in which the Michigan Supreme Court cited *Strickland*.

probability that his attorney's errors affected the outcome of his case. *Tucker*, 2007 U.S. Dist. LEXIS 78329, at *44 (citing *Strickland*, 466 U.S. at 694). Thus, the state-court decision was contrary to *Strickland*, and the merits of Tucker's claim must be reviewed de novo. *See Fulcher*, 444 F.3d at 799. Under any standard of review, however, Tucker has made an insufficient showing of prejudice.

Tucker argues, and the district court concluded, that AT's medical records from the accident would have provided the jury with an alternative explanation for the irregularities described in Dr. Inocencio's report. *See Tucker*, 2007 U.S. Dist. LEXIS 78329, at *45. In particular, the district court found it significant that the jury heard "no alternative explanation for the injuries to AT's genitals." *Id.* at *46. Yet Tucker was acquitted of the one charge to which such an alternative explanation would have been relevant: the digital/vaginal penetration charge. Thus, presentation of evidence that "the doctors treating AT after the car accident inserted fingers and medical instruments into her vagina to determine the cause of the vaginal bleeding," would not likely have resulted in a more favorable outcome for Tucker.

The only information in the medical records of apparent relevance to the charges of which Tucker was convicted is a notation that AT had "good sphincter tone" following the automobile accident. At first glance, this notation, as well as the absence of any indication of trauma to AT's anus at the time of the accident, appears to contradict Dr. Inocencio's later finding that AT had deep anal fissures consistent with sexual abuse. However, Dr. Inocencio testified at the evidentiary hearing that sexual abuse would not

necessarily affect a child's sphincter tone; rather, sphincter tone would only be damaged in cases of severe abuse involving the use of force.[6] Moreover, according to Dr. Inocencio, sphincter tone is better determined through the use of a colposcope, a procedure generally not undertaken in emergency-room examinations.

More significantly, however, the medical records provide no alternative explanation for the anal fissures noted in Dr. Inocencio's report. Dr. Inocencio testified that there "definitely" would have been an indication in the medical records if anal bleeding or fissures had been observed following the automobile accident. A child-abuse expert who also reviewed the accident records after trial, Dr. Stephen Guertin, found nothing of significance in the records with respect to the anal-penetration charges. While the absence of anal trauma after the accident tends to undermine the State's theory as to when the abuse occurred, it is even more damaging to an argument that the injuries noted by Dr. Inocencio were the result of the accident and not sexual abuse. Thus, the hospital records would have been of little, if any, help in countering the medical evidence presented by Dr. Eastman regarding the anal-penetration charges and, in fact, would not have supported the argument Tucker now contends his trial counsel should have pursued.

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[6] The applicable statutory definition of "sexual penetration" includes "any . . . intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of another person's body." MCL § 750.520a(r); *see* MCL § 750.520b(1)(a). Thus, the State was not required to prove that Tucker penetrated AT forcefully.

In any event, there was little to refute. The extent of Dr. Eastman's trial testimony regarding AT's anal injuries, given during direct examination, was as follows:

A The other thing that Dr. Inocencio mentioned is her anal findings.

Under anus,

"Done in a 'supine' position with child holding on to both flexed knees that are flexed at hips."

"Irregular slightly crythematous perianal folds. Deep fissures at 3, 4, 6, 8, 9, 12 o'clock. Immediate moderately prominent venous congestion at 4, 6, 8, 9-10 o'clock is seen. Linear vertical line extending posteriorly from 6 o'clock. No lesions, bleeding, discharge or bruising noted."

Again, compatible with abuse.

Q And is that deep fissures at certain areas of the clock, what is that?

A That's areas where the mucosa has broken and then healed back together, leaving a fissure.

Q Okay.

And is that something you would normally see in a nine year old?

A No, it's not.

Given this relatively brief discussion, as well as Dr. Inocencio's later testimony that good sphincter tone is not necessarilyinconsistent with sexual abuse and the lack of any other information contained in the medical records relevant to the charges of conviction, we cannot find that it is reasonably probable the jury would have reached a different conclusion had the records been presented at trial. Defense counsel's failure to obtain the records therefore resulted in no prejudice. Thus, his performance, regardless of whether it was up to professional standards, did not constitute ineffective assistance under *Strickland*.

III.

For the foregoing reasons, we reverse the district court's grant of habeas relief.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case No. 03-10254
Honorable David M. Lawson

[Filed October 23, 2007]

KEVIN TUCKER,	)
	)
Petitioner,	)
	)
v.	)
	)
JOHN CASON,	)
	)
Respondent.	)
	)

OPINION AND ORDER
CONDITIONALLY GRANTING PETITION
FOR WRIT OF HABEAS CORPUS

The petitioner, Kevin Tucker, was convicted in October 2000 by a Macomb County, Michigan jury of sexually molesting his daughter in 1996 when she was five years old. Critical to the State's case was medical evidence that the girl's hymen and anal tissue were irregular, which implied that penetration had taken place. But the jury did not hear evidence that the girl's

pelvis and vagina were injured in a serious automobile accident that had occurred before the alleged sexual assault was reported and the ensuing examination by the State's physician, whose report was read into evidence at trial. The petitioner, who currently is confined at West Shoreline Correctional Facility in Muskegon Heights, Michigan, has filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 alleging that this important defense evidence was not presented due to his trial attorney's constitutionally deficient performance, which resulted in the violation of the petitioner's Sixth Amendment rights. He also alleges that other trial errors deprived him of a fair trial in violation of the Due Process Clause. The respondent opposes the habeas petition on the grounds that some of the petitioner's claims are unexhausted and the other claims are procedurally defaulted or lack merit.

The Court finds that the petitioner properly exhausted the claims presented here in the state courts. The Court also finds that the argument concerning the admission of evidence, to the extend that it raises a federal constitutional issue, is procedurally defaulted. However, the Court believes that one of the petitioners claims of ineffective assistance of counsel requires issuance of the writ: that his trial attorney provided ineffective assistance by failing to obtain medical records that provide an alternative explanation for the victim's injuries. Trial counsel stated at least twice to the jury that the records were important, despite counsel's failure to investigate the contents of those records. The state courts' decisions on this claim applied the incorrect standards and are contrary to clearly established federal law as determined by the Supreme Court. This

Court, therefore, will issue a conditional writ of habeas corpus, which will allow the State a reasonable time to retry the petitioner if it chooses.

I.

The allegations made against the petitioner by his daughter, AT[1], led to a criminal information charging the petitioner with four counts of first-degree criminal sexual conduct. The State charged that the petitioner inserted his penis in the complainant's anus, vagina, and mouth and that he put a pencil in her anus. (Tr. Sept. 29, 2000, at 6). For reasons unclear to the Court, the case went to the jury on charges that the petitioner inserted (1) his penis in the victim's mouth, (2) his penis in the victim's anus, (3) a pencil in the victim's anus, (4) and his finger (not penis) in the victim's vagina. These events were to have occurred sometime during the late summer of 1996, just before AT started kindergarten. However, she did not report the incidents of abuse until August 7, 1999 when AT told her mother, Tracie Bowers, about these things. Tracie Bowers and the petitioner had been married but separated on Christmas Day 1998. Their divorce was finalized on June 9, 1999. The petitioner testified that he had visitation disputes with his ex-wife during this period, and he lost all contact with AT after the allegations of abuse emerged in August 1999.

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[1] Federal Rule of Civil Procedure 5.1, which will become effective December 1, 2007, requires that "in an electronic or paper filing with the court that contains . . . the name of an individual known to be a minor . . . a party or nonparty making the filing may include only . . . the minor's initials." Fed. R. Civ. P. 5.1(a). The Court intends to observe the practice intended by the soon-to-be-effective rule amendment.

The evidence at trial also established that AT was in a serious car accident on August 16, 1996, just before she started kindergarten. She was taken to Mt. Clements General Hospital where she was examined briefly. She was subsequently transferred to Children's Hospital in Detroit and remained in a coma for about a month.

The petitioner's main theory at trial was that AT had been sexually abused by someone other than the petitioner, and that AT's mother accused the petitioner because they had recently divorced and were fighting over visitation. However, as the case developed, an alternate theory emerged: that the evidence of genital trauma that was important to the State's case proving sexual abuse in fact was a result of the car accident.

At the preliminary examination, AT testified that just before the car accident, the petitioner "put his private in [her] privates," including her vagina, anus, and mouth. Prelim. Exam. Hr'g Tr. 9, Jan. 18, 2000. She also testified that the petitioner inserted a pencil into her "front private," "[b]etween [her] legs." *Id.* at 11. AT stated that she did not report the incident to her mother because the petitioner threatened to abuse her mother if she told anyone.

AT testified that another incident occurred after the accident. The petitioner asked her to play a game called frog and butterfly. AT was the butterfly. She wore a butterfly costume, and the petitioner tied a rope around her waist and hung her from the ceiling so she swung back and forth. AT stated that the petitioner was the frog, and he licked the outside of her costume in the chest area. The petitioner was

bound over for trial on four counts of criminal sexual conduct testified to by AT.

At trial, AT testified that the petitioner "put his privates in [her] privates." Trial Tr. 64, Sept. 29, 2000. She testified that the petitioner put a pencil "up [her] private," but she did not specify where the pencil was inserted. *Id.* at 68. AT also testified that she once saw her father dressed in women's clothing and wearing make-up. She said he threatened to abuse her mother if she told anyone. AT never testified that the petitioner inserted a finger in her vagina, although AT's uncle on her mother's side, Samuel Sargente, testified that the petitioner admitted putting his fingers in AT's vagina: "He said the only thing he ever did do to his daughter was, he took his two fingers, stuck them in warm water, put them in her vagina to rinse her out, and it was part of her therapy." *Id.* at 141. Mr. Sargente was unaware of any therapy AT needed that would require such treatment.

On cross-examination, AT testified that she wrote a number of letters to her father throughout the period during which her parents were divorcing, which occurred after the alleged sexual abuse. She testified that she had a good relationship with her father, and pictures she drew for him and letters she wrote to him were received in evidence.

Dr. Norma Inocencio, who never testified at trial, apparently examined AT after AT reported the abuse to her mother. Dr. Inocencio concluded in a report that abnormalities in the complainant's genital area were consistent with sexual abuse. These findings were explained to the jury through the testimony of Dr. Jay Eastman over the petitioner's objection. Both Dr.

Inocencio and Dr. Eastman work at the Care House of Macomb, an evaluation center for children who may have been sexually abused. Dr. Eastman reviewed Dr. Inocencio's report and stated that his "impression after reading through this report is that the findings that Dr. Inocencio found in her examination are compatible with sexual abuse." Trial Tr. 103, Sept. 29, 2000. He then read aloud from Dr. Inocencio's report and interpreted the report for the jury. Under questioning by the State, Eastman said:

> A. What you should see in a child of this age is a smooth edge of the hymen. What is described here is several places where the hymen has been broken and then healed. And in healing, instead of a smooth edge, there are notches in it.
>
> Q. And through your experience, you find that those notches are consistent with sexual abuse?
>
> A. Yes.

Id. at 104. Eastman also testified that Dr. Inocencio's report described deep fissures in the complainant's anus, which are not normally found in a young child.

On cross-examination, defense counsel asked Dr. Eastman about the medical records from the automobile accident:

> Q. Okay. You're aware that [AT] was in a serious accident?
>
> A. Yes.

Q. Okay. And what were the nature of the injuries in that accident?

A. I believe there was a broken leg and I'm not sure of the rest.

Q. Did you review the medical records?

A. I had a look at them, but I don't recall what they say.

Q. All right. And doing an examination of someone, the young lady in this case, who was involved in a serious accident, would it not be important to examine those records?

A. It could be.

Q. I mean, for example, if there were an injury to the vaginal area, wouldn't that be significant?

A. It could be.

Q. When you say, Doctor, it could be, what do you mean?

A. If there were a penetrating injury to the vagina, say, the child had straddled something that penetrated into the vagina, that could be important.

Id. at 108-09.

The petitioner testified at trial and denied sexually abusing AT or telling Mr. Sargente that he inserted his fingers into AT's vagina. He testified that the divorce

was contentious. After he filed a complaint with the Macomb County, Michigan Friend of the Court about visitation, his relationship with AT's mother became even worse.

The petitioner also admitted that he is a cross-dresser and that his wife once saw him wearing a bra. However, he denied that he ever dressed as a woman in front of AT.

The defense presented several other witnesses at trial who testified that the petitioner has a reputation for truthfulness. In addition, Dr. Larry Friedberg, a clinical psychologist, testified that thirty percent of sexual abuse allegations are false. During closing argument, defense counsel argued to the jury that the Dr. Eastman's failure to review the medical records from the car accident called into question the doctor's conclusions.

> And you will remember the testimony regarding the fact that [AT] had had a serious accident. And I asked the doctor, did you review – actually I asked him did the doctor who wrote the report review the accident reports or the medical reports? And the answer was there is no indication in that report that those reports had been reviewed. And I suggest to you might that not be important to review reports? Do we know that something of that nature didn't happen during the course of the accident?

Trial Tr. 39-40, Oct. 2, 2000. In rebuttal, the prosecutor pointed out that no evidence was presented

regarding AT's injuries from the car accident even though defense counsel could easily have gotten the records. The prosecutor said:

> Now, defense attempts to show about how the victim was in a serious car accident so maybe something in that car accident may have caused her hymen to be missing and deep anal fissures. Well, I'm not certain what kind of car accident that would be, however, defense has the exact same subpoena powers as the prosecution as you can tell, because they called witnesses as well, and there was not one doctor that got on that stand that said when [AT] was in this car accident she was penetrated by something. There is no evidence to say that. The only evidence to say that she was penetrated is the evidence of [AT]'s testimony that she was penetrated by her father sexually. To go from there to some sort of car accident mishap is a quantum leap that this jury should not make.

Id. at 44-45.

The jury submitted at least four notes to the trial court during its deliberations. In the first note, the jury requested a copy of the charges, a transcript of the complainant's testimony, and an elaboration of the complainant's testimony about something that happened in the basement of her home. The trial court provided the jurors with a copy of the jury instructions and stated that the jurors should ignore the comment about what happened in the basement because it was irrelevant. As for the transcripts, the court explained that it did not have "realtime" or the ability to "play it right back." Trial Tr. 69, Oct. 2, 2000.

The next note requested the exhibits and asked whether there was a typographical error in the charge that referred to the petitioner placing his finger in AT's vagina. The jurors noted that the AT referred to the petitioner's penis, not his finger. The trial court provided the exhibits and responded that the charges were as written in the jury instructions. The court again said that there were no transcripts available. Trial Tr. 72-73, Oct. 2, 2000.

In their third note, the jurors asked why they could not review the transcripts of AT's testimony. The note states, "There is some disagreement among the jurors as to Ms. Tucker's testimony regarding the pencil and other matters." Pet'r Br. in Mich. Ct. App. Ex. D, Jury Note. The trial court responded that it did not have a transcript available, that it usually took four to six weeks to prepare one, and that it was difficult for the court reporter to read from his notes. The court then asked the jurors to use their collective memories and decide issues on which they could agree.

Deliberation continued to the next day, and the jury sent the judge another note stating the jury's "collective memory is uncertain" and asking two questions. Trial Tr. 3-4, Oct. 3, 2000. First, the jurors asked, "The third charge refers to 'pencil/anal.' However, our collective memory is uncertain as to Ms. Tucker's testimony and whether she said 'anal' versus 'vaginal' penetration with the pencil. Is this difference in where (i.e. what body part) the penetration occurred significant relative to our verdict?" Pet'r Br. in Mich. Ct. App. Ex. E, Jury Note. The judge responded that the jury had to decide the defendant's guilt beyond a reasonable doubt. Next, the jurors asked, if they could find the defendant guilty of three charges but remain

undecided on the fourth. The judge answered, "you are the jury if that's what you have concluded you can do that." Trial Tr. 4, Oct. 3, 2000. A short time later, on October 3, 2000, the jury returned its verdict acquitting the petitioner of the fourth count charging digital/vaginal penetration and convicting him of the other three counts. The petitioner was sentenced to concurrent terms of eighty-five to two hundred forty months in prison.

On October 13, 2000, after the trial concluded, the petitioner learned from his sister that the 1996 car accident involving AT resulted in multiple pelvic fractures and vaginal bleeding. He notified his trial counsel, who then ordered the medical reports containing information about these injuries, asked a physician to review the records, and began drafting a motion for a new trial based on newly discovered evidence.

The petitioner subsequently retained a new attorney, who filed a motion for a new trial on the grounds that trial counsel was ineffective by failing to obtain the medical records from the car accident before trial, and the trial court erred in denying the jury's request to provide transcripts or re-read testimony. At oral arguments on the motion, the trial court denied relief on the issue involving transcripts, but the court agreed to hold an evidentiary hearing on the petitioner's ineffective assistance of counsel claim.

On August 29, 2001, the trial court held the evidentiary hearing. Testimony was taken from John Bain (trial counsel), Dr. Norma Inocencio, and Lorna and Stuart Timmerman (the petitioner's sister and brother-in-law). Mr. Bain testified that he was aware

of AT's car accident very early in the litigation. He knew that AT spent significant periods of time in the hospital but he did not request the medical records related to the accident until after the guilty verdict. He explained that he did not request the medical records beforehand beacuse he did not think they were relevant, as he was unaware of any vaginal injuries in the accident. Mr. Bain testified that the Tucker family believed the sexual abuse had been committed by AT's maternal grandfather, Herman.

Mr. Bain testified that he attempted to retain a doctor to dispute Dr. Inocencio's findings. He called and wrote to Dr. Stephen Guertin and sent him a copy of Dr. Inocencio's report. Mr. Bain never received a response from Dr. Guertin, and he therefore concluded that Dr. Guertin did not believe he could be of any assistance. Mr. Bain also spoke with and sent Dr. Inocencio's report to a Dr. Goldsmith. Mr. Bain made several attempts to reach Dr. Goldsmith but received no response. He again concluded that Dr. Goldsmith could be of no assistance. Mr. Bain finally attempted to retain a Dr. Church, a pediatrician at Ford Hospital. Mr. Bain discussed Dr. Inocencio's report with Dr. Church over the telephone and asked whether there was any other way of explaining the penetration or absence of a hymen. Dr. Church responded that the injury could be the result of being impaled on a picket fence. Dr. Church told Mr. Bain that there was no other way such injuries could have occurred.

Not having subpoenaed or read the medical records before trial, Mr. Bain stated that he did not know about the pelvic and vaginal injuries until after the trial was over. Within an hour of learning about these injuries, Mr. Bain contacted the prosecutor to discuss

the possibility of a new trial. He also obtained the records from Mt. Clemons General Hospital and tried to procure the records from Children's Hospital, although he was unable to obtain those records. Mr. Bain hired Dr. William Floyd to review the records. He attempted to contact Dr. Inocencio to find out whether the information about the pelvic and vaginal injuries would change her opinion. However, she never returned his calls. Mr. Bain testified that had he known of the vaginal bleeding, he would have gotten the medical records and used them at trial.

Dr. Inocencio testified at the hearing that she noticed a number of scars on AT during her examination and asked AT's mother about them. AT's mother told Dr. Inocencio that AT had been in a car accident that caused her to be in a coma for about a month. Dr. Inocencio stated she was never told about the vaginal bleeding prior to her examination of AT, but she may have been told about the fractured pelvis. Dr. Inocencio did not review the medical records from the accident before the examination. She also testified that a doctor treating a patient with vaginal bleeding might insert a finger into the vagina as part of the examination to determine the extent of the injuries and that gauze or padding might also be inserted.

On cross-examination by the prosecutor, Dr. Inocencio testified that after the trial she reviewed AT's medical records from Mt. Clemens General Hospital, where AT was treated briefly after the car accident before being transferred to Children's Hospital for a two-month stay. She stated, "I don't think you would see such a hymen in an accident, described in a motor vehicle accident such as this child had because the hymen is a very internal organ; that

unless it had been penetrated it would not show what it is, you know." Ev. Hr'g Tr. 58, Aug. 29, 2001. She also testified that the records from the accident indicated "good sphincter tone for the anus," Ev. Hr'g Tr. 61, Aug. 29, 2001, which tended to contradict her findings of deep fissures in the anal tissues Dr. Inocencio described in her report read into the record at trial. Furthermore, the medical reports from the accident described an injury to AT's right labia majora, although Dr. Inocencio's examination of AT revealed injury to the left labia majora. However, AT was at Mt. Clemons General Hospital for only a few hours before being transferred to Children's Hospital. Dr. Inocencio did not review the records from Children's Hospital, where AT was treated for two months.

Stuart Timmerman, the petitioner's brother-in-law, testified that he and other family members told Mr. Bain about AT's pelvic injuries in 1999. "We talked about the fact that she was in a coma for an extended period of time, along with [the petitioner] and that she had had some severe pelvic trauma and that she had experienced a period or early on in Children's [Hospital] at least, of severe vaginal bleeding." Ev. Hr'g Tr. 72, Aug. 29, 2001. Mr. Timmerman stated that the family asked Mr. Bain to obtain the medical records. Lorna Timmerman, the petitioner's sister, testified similarly.

The petitioner's new attorney also deposed Dr. Stephen Guertin, medical director at Sparrow Regional Children's Center. Dr. Guertin reviewed the photographs of AT taken at Care House and testified that AT's hymen appeared completely normal. The only thing even remotely suspicious was "a little bit of narrowing at about the three o'clock position." Guertin

Dep. Tr. 14-15, Sept. 17, 2001. Dr. Guertin stated that "an irregular hymen is a normal thing," but that the narrowing could also have been caused by trauma. "It could be a penis, it could be an instrument, it could be a finger, it could be a waterskiing accident, it could be any other form of intrusion or extrusion." *Id.* at 17. Dr. Guertin noted a "sort of crinkly skin area on the left labia majora," which he stated is often caused by chaffing or dampness and could be a symptom of a disease known as lichen sclerosus et atrophicus. He stated that the finding did not suggest sexual trauma. Dr. Guertin also stated that AT's anus was "completely normal looking." *Id.* at 18. "There aren't any lacerations, tears, fissures, scars, skin tags. There's nothing to suggest that the child has suffered anal trauma." *Ibid.*

Dr. Guertin further testified that the narrowing in the hymen could easily have been caused by the car accident:

> In this particular child she was involved in a traffic accident where there was pelvic injury. There was blood coming from the vagina itself, and she actually had an exploration done of her vagina in Mount Clements. To explore the vagina you have to stick your finger across the hymen into the vagina and feel the walls of the vagina feeling for a shard, a bone, or a free edge of bone. In addition, she had a second examination done and also had vaginoscopy done. I believe those were done at Children's Hospital of Michigan. In each of those cases it entails the insertion of something across the hymen into the vagina to look for injury. In addition, you have the pelvic injury itself, and

> certainly pelvic injuries have been associated from accidents with lacerations or injuries of the vulva. So you actually have a situation here where grown adults were sticking their fingers into her vagina to feel for bone. To do that they have to go across the hymen. And they also stuck instruments across the hymen in order to look in the vagina.

Id. at 28-29.

The trial court denied the petitioner's motion in a written opinion and order, reasoning as follows:

> To establish ineffective assistance of counsel, defendant must demonstrate that: (1) counsel's performance fell below an objective standard of reasonableness; and (2) such representation so prejudiced him as to deprive him of a fair trial. (emphasis added) *People v. Pickens*, 446 Mich. 298, 302-303; 521 NW2d 797 (1994). *See also Strickland v. Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984).
>
> At the *Ginther* hearing, trial counsel John Bain ("Bain") testified that his representation of defendant had commenced in August 1999 and that "very early on" he had learned that the victim had been involved in an automobile accident in August 1996. *8-29-01 Tr. at 8-9, 27.* However, it was not until October 13, 2000 – after defendant had been convicted – that Bain first learned that the victim may have sustained some vaginal injuries in the accident. *Id. at 23-25, 29, 33.* Bain was told about the possible injuries by defendant while defendant was in

jail. *Id.* He testified that he immediately contacted the prosecution, spoke with defendant's family, and had defendant sign a medical release so that he could obtain the pertinent medical records. *Id. at 31.* At the sentencing hearing, Bain informed the Court that he had first learned about the possible injuries on October 13, 2000. *Id.* Defendant had been standing next to him at the time and had not disagreed with his statement to the Court. *Id. at 31-32.* Moreover, Bain had had the family submit notes to him prior to trial regarding the chronology of events and none of the notes had mentioned a pelvic fracture, vaginal bleeding, or vaginal laceration. *Id. at 35*. Bain stated that he would have acquired the records prior to trial if he would have learned about the possible injuries at such time. *Id. at 32.*

Based on the totality of evidence, the Court is not convinced that Bain's performance had fallen below an objective standard of reasonableness. *Pickens, supra*. The Court opines that Bain should not have reasonably been expected to order the medical records prior to trial inasmuch as there had been no indication that the victim may have sustained vaginal injuries from the automobile accident. Further, the Court is satisfied that Bain had acted properly after he first learned about the possible injuries. Since defendant has failed to meet his burden of establishing the first part of the mandatory two-tier test under *Pickens, supra*, the Court need not consider whether he has fulfilled his burden as to the second part thereof.

Order Denying Motion for New Trial, No. 2000-180-FC, at 1-3 (Nov. 30, 2001) [dkt # 19 at 40-42].

The petitioner filed a direct appeal in the Michigan Court of Appeals raising the following claims:

I. The trial court reversibly erred in refusing the jury's reasonable requests for the rereading of trial testimony, in violation of the right to due process and a fair trial.

II. Defense counsel was ineffective for failing to have Dr. Inocencio's report and the photographs taken during her examination reviewed by another doctor, for failing to obtain the medical records from [AT]'s automobile accident, for conceding that sexual abuse occurred, for eliciting testimony that [AT]'s previous statements and testimony were consistent with her trial testimony, when they were inconsistent, and for failing to impeach witnesses with prior inconsistent testimony.

III. Reversal is required where the court permitted highly prejudicial testimony that Mr. Tucker was a cross dresser over defense objection, without giving a cautionary instruction, despite the court's intention to do so, and, in the alternative, defense counsel was ineffective for failing to object to the failure to give a cautionary instruction.

IV. The cumulative effect of these errors denied due process and the right to a fair trial.

The Michigan Court of Appeals affirmed the petitioner's conviction in a *per curiam* decision. *People v. Tucker*, No. 232094, 2003 WL 734168 (Mich. Ct. App. Mar. 4, 2003). The petitioner filed an application for leave to appeal in the Michigan Supreme Court. On September 25, 2003, the Michigan Supreme Court denied leave to appeal because it was not persuaded that the questions presented should be reviewed. *People v. Tucker*, 469 Mich. 903, 669 N.W.2d 816 (2003). The petitioner thereafter filed through counsel the present habeas petition, asserting the following claims as grounds for relief:

> I. The trial court reversibly erred in refusing the jury's reasonable requests for the rereading of trial testimony, in violation of the right to due process and a fair trial, and defense counsel was ineffective for failing to object.
>
> II. Defense counsel was ineffective for failing to have Dr. Inocencio's report and the photographs taken during her examination reviewed by another doctor, for failing to obtain the medical records from [the complainant's] automobile accident, for conceding that sexual abuse occurred, for eliciting testimony that [the complainant's] previous statements and testimony were consistent with her trial testimony, when they were inconsistent, and for failing to impeach witnesses with prior inconsistent testimony.
>
> III. The petition should be granted where the court permitted highly prejudicial testimony

that Mr. Tucker was a cross dresser over defense objection, without giving a cautionary instruction, despite the court's intention to do so, and, in the alternative, defense counsel was ineffective for failing to object to the failure to give a cautionary instruction.

IV. The cumulative effect of these errors denied due process and the right to a fair trial.

The respondent alleges that the petitioner did not fairly present all his claims to the state court as federal constitutional claims. The respondent argues in the alternative that the petitioner's claims are procedurally defaulted, are not cognizable on habeas review, or lack merit.

II.

The respondent first argues that the petitioner did not fairly present his first, third, and fourth claims to the state courts as federal constitutional claims. The Court disagrees.

The doctrine of exhaustion of state remedies requires state prisoners to "fairly present" their claims as federal constitutional issues in the state courts before raising those claims in a federal habeas corpus petition. *See* 28 U.S.C. § 2254(b)(1)(A) and (c); *O'Sullivan v. Boerckel*, 526 U.S. 838, 844 (1999); *McMeans v. Brigano*, 228 F.3d 674, 680-81 (6th Cir. 2000); *Rust v. Zent*, 17 F.3d 155, 160 (6th Cir. 1994). The exhaustion requirement is satisfied if a prisoner invokes one complete round of the state's established appellate review process, including a petition for

discretionary review to a state supreme court. *O'Sullivan*, 526 U.S. at 845. A prisoner "'fairly presents' his claim to the state courts by citing a provision of the Constitution, federal decisions using constitutional analysis, or state decisions employing constitutional analysis in similar fact patterns." *Carter v. Bell*, 218 F.3d 581, 607 (6th Cir. 2000); *see also Prather v. Rees*, 822 F.2d 1418, 1420 (6th Cir. 1987) (holding that "[o]rdinarily, the state courts must have had the opportunity to pass on defendant's claims of constitutional violations"). A Michigan petitioner must present each ground to both Michigan appellate courts before seeking federal habeas corpus relief. *See Mohn v. Bock*, 208 F. Supp. 2d 796, 800 (E.D. Mich. 2002); *see also Baldwin v. Reese*, 541 U.S. 27, 29 (2004). The petitioner bears the burden of showing that state court remedies have been exhausted. *Rust*, 17 F.3d at 160.

The Court is satisfied that the petitioner's state court briefs put the state courts on notice that he was raising federal constitutional issues. The petitioner's briefs in both state courts and here phrase the issues in virtually identical terms. The petitioner raised his first claim in state court under the Due Process Clause of the Fourteenth Amendment to the United States Constitution. He raised his third claim in state court under the Fifth and Fourteenth Amendments to the Constitution, and he supported his third and fourth claims with federal case law. The petitioner phrased his claims in constitutional terms or in terms sufficiently particular to bring to mind specific constitutional rights. He also alleged facts well within the mainstream of constitutional law. The Court, therefore, must reject the respondent's exhaustion defense.

III.

The provisions of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214 (Apr. 24, 1996), which govern this case, "circumscribe[d]" the standard of review federal courts must apply when considering applications for a writ of habeas corpus raising constitutional claims, including claims of ineffective assistance of counsel. *See Wiggins v. Smith*, 539 U.S. 510, 520 (2003). As amended, 28 U.S.C. § 2254(d) imposes the following standard of review for habeas cases:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d). Therefore, federal courts are bound by a state court's adjudication of a petitioner's claims unless the state court's decision was contrary to or involved an unreasonable application of clearly established federal law. *Franklin v. Francis*, 144 F.3d

429, 433 (6th Cir. 1998). Mere error by the state court will not justify issuance of the writ; rather, the state court's application of federal law "must have been objectively unreasonable." *Wiggins*, 539 U.S. at 520-21 (quoting *Williams v. Taylor*, 529 U.S. 362, 409 (2000) (internal quotes omitted)). Additionally, this Court must presume the correctness of state court factual determinations. 28 U.S.C. § 2254(e)(1) ("In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct."); *see also West v. Seabold*, 73 F.3d 81, 84 (6th Cir. 1996) (stating that "[t]he court gives complete deference to state court findings of historical fact unless they are clearly erroneous").

The Supreme Court has explained the proper application of the "contrary to" clause as follows:

> A state-court decision will certainly be contrary to [the Supreme Court's] clearly established precedent if the state court applies a rule that contradicts the governing law set forth in our cases. . . .
>
> A state-court decision will also be contrary to this Court's clearly established precedent if the state court confronts a set of facts that are materially indistinguishable from a decision of this Court and nevertheless arrives at a result different from [the Court's] precedent.

Williams, 529 U.S. at 405-06.

The Supreme Court has held that a federal court should analyze a claim for habeas corpus relief under the "unreasonable application" clause of § 2254(d)(1) "when a state-court decision unreasonably applies the law of this Court to the facts of a prisoner's case." *Id.* at 409. The Court defined "unreasonable application" as follows:

> [A] federal habeas court making the "unreasonable application" inquiry should ask whether the state court's application of clearly established federal law was objectively unreasonable. . . .
>
> [A]n *unreasonable* application of federal law is different from an *incorrect* application of federal law. . . . Under § 2254(d)(1)'s "unreasonable application" clause, then, a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable.

Id. at 409, 410-11. *See also Davis v. Coyle*, 475 F.3d 761, 766 (6th Cir. 2007); *King v. Bobby*, 433 F.3d 483, 489 (6th Cir. 2006); *Harbison v. Bell*, 408 F.3d 823, 828-29 (6th Cir. 2005); *Rockwell v. Yukins*, 341 F.3d 507, 512 (6th Cir. 2003) (en banc). "If the federal court finds that, viewed objectively, the state court has correctly identified the governing legal principle from the Supreme Court's decisions but unreasonably applied that principle to the facts of the prisoner's case, it may grant the writ." *Ege v. Yukins*, 485 F.3d

364, 371 (6th Cir. 2007) (quoting *Millender v. Adams*, 376 F.3d 520, 523 (6th Cir. 2004)).

A.

Of the four claims presented, the Court finds that only one warrants habeas relief: that trial counsel's failure to investigate the circumstances of AT's automobile accident and obtain medical records of her treatment amounted to substandard performance and resulted in prejudice to the petitioner's defense in violation of the Sixth Amendment. The petitioner alleges that his trial attorney (1) failed to have Dr. Inocencio's report and photographs reviewed by another doctor, (2) failed to obtain the medical records from the complainant's automobile accident, (3) conceded that sexual abuse occurred, (4) elicited testimony that the complainant's previous statements and testimony were consistent with her trial testimony, and (5) failed to impeach witnesses with prior inconsistent testimony. The trial court found that trial counsel's performance was not deficient and did not reach the prejudice issue; the Michigan Court of Appeals agreed and also concluded that the petitioner did not suffer prejudice.

The Supreme Court has "emphasized that the Sixth Amendment right to counsel exists 'in order to protect the fundamental right to a fair trial.'" *Lockhart v. Fretwell*, 506 U.S. 364, 368 (1993) (quoting *Strickland v. Washington*, 466 U.S. 668, 684 (1984)). "In *Strickland*, [the Court] identified the two components to any ineffective-assistance claim: (1) deficient performance and (2) prejudice." *Id.* at 369. *See also Towns v. Smith*, 395 F.3d 251, 258 (6th Cir. 2005). To show a violation of the Sixth Amendment right to

effective assistance of counsel, a petitioner must establish that his attorney's performance was deficient and that the deficient performance prejudiced the defense. *Strickland*, 466 U.S. at 687. An attorney's performance is deficient if "counsel's representation fell below an objective standard of reasonableness." *Id.* at 688. The defendant must show "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* at 687. "Judicial scrutiny of counsel's performance must be highly deferential." *Id.* at 689. The Court has "declined to articulate specific guidelines for appropriate attorney conduct and instead [has] emphasized that the proper measure of attorney performance remains simply reasonableness under prevailing professional norms." *Wiggins*, 539 U.S. at 521 (quoting *Strickland*, 466 U.S. at 688) (internal quotes omitted).

An attorney's deficient performance is prejudicial if "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.* at 687. The defendant must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694. Unless the petitioner demonstrates both deficient performance and prejudice, "it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable." *Id.* at 687.

To determine whether defense counsel's performance fell outside the wide range of "prevailing professional norms" in this case, the Court will

evaluate the cited instances of ineffective assistance from trial counsel's point of view at the time. In so doing, the Court finds that only the petitioner's second claim has merit, and that claim will be discussed first.

1.

The petitioner's second claim is that Mr. Bain failed to perform effectively because he did not obtain the complainant's medical records from her automobile accident. The petitioner contends that the medical records would have supported a defense that injuries from the car accident or treatment for those injuries caused the abnormalities observed by Dr. Inocencio. The trial court addressed this argument in ruling on the petitioner's motion for a new trial. The trial court concluded that Mr. Bain was not ineffective for failing to obtain the records because he did not actually know about the vaginal injuries until after the trial concluded. The Michigan Court of Appeals affirmed this decision.

The question of when trial counsel learned of the exact injuries AT had suffered in the automobile accident – specifically the injury to her pelvis and vagina – was the subject of a dispute at the evidentiary hearing. Trial counsel testified that he did not learn of the injuries until after conviction, whereas the petitioner's sister and brother-in-law testified that they discussed the complainant's medical records with defense counsel and mentioned AT's pelvic trauma and severe vaginal bleeding before trial. The trial court chose to accept trial counsel's chronology, and the state court of appeals deferred to the trial court's resolution of the credibility dispute. The trial court's implicit finding that defense counsel was credible is presumed

to be correct unless the petitioner can rebut the presumption by clear and convincing evidence. 28 U.S.C. § 2254(e)(1). The Court finds no basis to upset the state courts' factual finding, and therefore the Court will examine the issue based on the premise that trial counsel did not have actual knowledge of AT's pelvic/vaginal injuries until shortly after trial.

The Michigan Court of Appeals concluded that the petitioner's trial counsel did not perform deficiently precisely because he did not have actual knowledge of AT's pelvic injuries until after the trial ended:

> [D]efendant contends that defense counsel was ineffective for failure to produce specific medical evidence to suggest that an automobile accident, not defendant's conduct, resulted in the victim's abnormal medical evaluation. During the *Ginther* hearing, trial counsel testified that he did not learn about the victim's pelvic injuries, suffered in the automobile accident, until after the trial concluded. He testified that it was his understanding that her injuries did not involve the pelvic area. In contrast, two of defendant's family members testified that trial counsel was told during the early stages of representation that the accident caused the victim to suffer "severe vaginal bleeding." A medical expert testified that the victim's post-accident treatment may have caused any physical "abnormalities" diagnosed by the prosecution's expert.
>
> *We agree that trial counsel's performance would have been deficient if he knew that the victim suffered pelvic injuries in the car accident and*

> *failed to somehow incorporate those facts into a defense.* Thus, resolving this question *necessarily turns on whether trial counsel knew, before the trial, that the victim suffered pelvic injuries during the accident.* After the *Ginther* hearing, the trial court specifically found that trial counsel did not learn about the pelvic injuries until after the trial. Because the witnesses' testimony was in conflict, resolution of this issue turned on the witnesses' credibility. Witness credibility issues are for the trier of fact to decide, and "we will not resolve credibility issues anew on appeal." *See People v. Milstead*, 250 Mich. App. 391, 404, 648 N.W.2d 648 (2002). Because there was ample evidence supporting the trial court's finding, we are not persuaded that the finding was clearly erroneous. *LeBlanc*, *supra* at 579, 640 N.W.2d 246. Accordingly, we reject defendant's contention that trial counsel was deficient.

Tucker, 2003 WL 734168, at *4 (emphasis added).

As a general rule, trial counsel's strategic decisions on how the trial is to be conducted are afforded great deference. As the Supreme Court explained:

> It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight,

> to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy.

Strickland, 466 U.S. at 689 (internal quotes and citations omitted). However, "a lawyer's acts and omissions must be judged on the basis of what he knew, *or should have known*, at the time his tactical choices were made and implemented." *Ouber v. Guarino*, 293 F.3d 19, 25 (1st Cir. 2002) (emphasis added). It is equally true that "errors of tactics or omission do not necessarily mean that counsel has functioned in a constitutionally deficient manner." *Greer v. Mitchell*, 264 F.3d 663, 676 (6th Cir. 2001).

"Strategic" choices that have no hope of succeeding, are made without adequate investigation or preparation, or actually imperil the defendant's case cannot be considered "sound."

> [S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a

> duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments.

Strickland, 466 U.S. at 690-91. "Only choices made after a reasonable investigation of the factual scenario are entitled to a presumption of validity. . . . [A] decision . . . cannot be accord[ed] the normal deference to strategic choices [where] it was uninformed." *Rolan v. Vaughn*, 445 F.3d 671, 682 (3rd Cir. 2006). An obviously defective choice is "not a reasonable strategic decision entitled to deference." *Moss v. Hoffbauer*, 286 F.3d 851, 865 (6th Cir. 2002) (finding that defense counsel's reliance on the cross-examination of an eyewitness by a co-defendant unreasonable when the two defendants' interests were not aligned).

Contrary to the state court of appeals' view, federal law requires that counsel's performance be assessed not only on the basis of what he actually knew at the time, but also what he should have known if he had conducted a reasonable investigation. The Supreme Court made that point quite clearly in *Wiggins*, 539 U.S. at 527-28, a death penalty case, in which the Court held that the state court of appeals unreasonably applied *Strickland*'s governing principles in rejecting the petitioner's ineffective assistance claim because the state court's conclusion that counsel's performance was within professional norms was objectively unreasonable. Counsel did not present evidence at the penalty phase on the petitioner's

personal background, which might have been a valid strategic choice under some circumstances. But counsel had failed to make a reasonable investigation into the petitioner's social history. *Ibid.* (noting that under *Strickland*, "strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation") (citation and internal quotation marks omitted). This failure reasonably to investigate, in turn, rendered the state court's deference to counsel's strategic decision not to present mitigating evidence of the petitioner's social history objectively unreasonable as well. *Ibid.* (stating that "counsel chose to abandon their investigation at an unreasonable juncture, making a fully informed decision with respect to sentencing strategy impossible").

The Court concludes, therefore, that the state court's resolution of this claim was contrary to federal law. The state court determined that the only way trial counsel's failure could constitute ineffective assistance was if he had actual knowledge before trial of the vaginal injuries AT sustained in the car accident. *Tucker*, 2003 WL 734168, at *4 (asserting that "resolving this question necessarily turns on whether trial counsel knew, before the trial, that the victim suffered pelvic injuries during the accident"). This is an incorrect statement of federal law. A criminal defense attorney is required to do more than act reasonably based on the information actually in his possession. He also is required to conduct a reasonable investigation. *Strickland*, 466 U.S. at 69091. "[A] lawyer's his tactical choices were made and implemented." The state court failed to "consider not only the quantum of evidence already *known* to

counsel, but also whether the known evidence would lead a reasonable attorney to investigate further." *Wiggins*, 539 U.S. at 527 (emphasis added); *Johnson v. Bell*, 344 F.3d 567, 577 (6th Cir. 2003) (considering whether "counsel *should have known* that further inquiry" was needed (emphasis added)). Its decision therefore is contrary to federal law.

There is no dispute that trial counsel had actual knowledge of the automobile accident and the fact that it resulted in serious injuries to AT. Should trial counsel have obtained the medical records from the car accident before trial as part of a reasonable investigation in the case? Mr. Bain answered that question himself during his cross-examination of Dr. Eastman and his argument to the jury. The petitioner's trial counsel attempted to call into doubt the doctor's conclusion that abuse occurred by pointing to the doctor's failure to review the medical records. Ironically, trial counsel himself had failed to review those records. His decision to comment on the content of the records, a decision made without reviewing the records, is not sound trial strategy entitled to deference. Mr. Bain plainly knew the importance of these records since he specifically argued the importance of the records to the jury: "And I suggest to you might that not be important to review reports? Do we know that something of that nature didn't happen during the course of the accident?" Trial Tr. 39-40, Oct. 2, 2000. Of course, the only way to have known for sure was to obtain and read the medical records. The record in this case discloses no possible detriment to the defense that could have resulted from obtaining them. No reasonable professional judgment can support the limitation on investigation. The failure to obtain those medical records as part of the pretrial

investigation was not reasonable, and the decision to proceed to trial without them amounted to substandard performance.

The state court also concluded that, even if the petitioner's trial counsel was deficient, the petitioner was not prejudiced:

> Moreover, we note that developing the possibility that the accident could have resulted in physical conditions resembling those commonly associated with sexual abuse would only have presented an alternative explanation for the complainant's physical condition. It would not have eliminated the possibility of sexual penetration, nor would it have called into question the victim's compelling testimony against defendant. Accordingly, we cannot conclude that, but for trial counsel's failure to refute the prosecution's expert testimony, defendant would not have been convicted. *Snider*, *supra* at 423-424, 608 N.W.2d 502. Consequently, we reject defendant's contention that counsel was ineffective as to this issue. *Id.*

Tucker, 2003 WL 734168, at *4. This articulation of the prejudice standard also is an incorrect statement of federal law. The standard for determining prejudice is not whether effective advocacy would have "eliminated the possibility" that the defendant committed the crime or that the petitioner "would not have been convicted." The petitioner is required to show "a *reasonable probability* that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the

outcome." *Strickland*, 466 U.S. at 694 (emphasis added).

Applying the correct standard, this Court has little trouble concluding that it is reasonably probable that a different result would have been reached if the jury had know of AT's injuries as described in the medical records following the automobile accident. This case involved a substantial delay in the report of the alleged sexual abuse. The abuse did not come to light until it was related by the petitioner's wife, with whom the petitioner was then involved in a contentions divorce that included a dispute over visitation rights. The opportunity to manipulate the testimony of AT, a child, certainly existed, and AT's mother no doubt had a motive to do so. If the jury had a doubt that sexual penetration had occurred, it likely was dispelled by the physical evidence related by Dr. Easton. The introduction of the medical records that provided a logical alternative explanation for the physical findings that Dr. Easton argued were consistent with sexual abuse gives rise to a reasonable probability that the jury would have found reasonable doubt in AT's testimony. The jury's inability to consider that evidence undermines confidence in the outcome of the state proceedings.

Moreover, the petitioner's trial attorney pointedly questioned Dr. Eastman at trial whether it would be important to examine the medical records following the car accident to determine if there were an injury to the vaginal area, and in closing arguments he specifically stated, "And I suggest to you might that not be important to review reports? Do we know that something of that nature didn't happen during the course of the accident?" Trial Tr. 39-40, Oct. 2, 2000.

That argument provoked the prosecutor to observe that the petitioner never obtained the records either, suggesting to the jury that the records did not contain anything supporting the defense. As it turns out, of course, the medical records soundly rebut that contention. The petitioner has presented evidence that the doctors treating AT after the car accident inserted fingers and medical instruments into her vagina to determine the cause of the vaginal bleeding. Guertin Dep. Tr. 28-29, Sept. 17, 2001. The failure to obtain those records before trial foreclosed that argument, left the jury with no alternative explanation for the injuries to AT's genitals, and deprived the petitioner of valuable defense evidence that could have changed the result of the trial.

The Court must conclude, therefore, that the state courts' decisions that trial counsel's performance was reasonable and that no prejudice resulted are contrary to federal law as established by Supreme Court precedent. The petitioner is entitled to habeas relief on this claim.

2.

The Court can find no deviation from proper practice in trial counsel's pursuit of an expert to review Dr. Norma Inocencio's findings. Dr. Inocencio examined AT after AT reported the alleged sexual abuse to her mother and concluded that abnormalities in AT's genital area were consistent with sexual abuse. Her findings were recounted in a report which was read and explained to the jury through the testimony of Dr. Jay Eastman.

The petitioner alleges that his trial attorney should have asked other physicians to review Dr. Inocencio's findings. According to the petitioner, if defense counsel had done so, he would have received a medical opinion critical of Dr. Inocencio's findings, and he would have learned that AT's vagina and anus were normal with the possible exception of a narrowed hymen, which could have been caused by injuries she sustained in an automobile accident or by treatment she received for the injuries. The petitioner's argument is based on the testimony of Dr. Stephen Guertin, whom the petitioner's current attorney deposed after trial. Dr. Guertin opined on the basis of photographs taken of the complainant during Dr. Inocencio's examination that the AT's vagina and anus were normal and that a narrowed hymen was the only suspicious area.

A defense attorney "has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." *Strickland*, 466 U.S. at 691. Nonetheless, "[w]here counsel fails to investigate and interview promising witnesses, and therefore 'ha[s] no reason to believe they would not be valuable in securing [defendant's] release,' counsel's inaction constitutes negligence, not trial strategy." *Workman v. Tate*, 957 F.2d 1339, 1345 (6th Cir. 1992) (quoting *United States ex rel. Cosey v. Wolff*, 727 F.2d 656, 658 n.3 (7th Cir. 1984)). When the failure to investigate key evidence is the result of negligence, not strategy, the failure may not be

excused. *Sims v. Livesay*, 970 F.2d 1575, 1580-81 (6th Cir. 1992).

The petitioner's trial attorney testified at the evidentiary hearing that he placed a telephone call to Dr. Guertin, wrote to him, and sent him Dr. Inocencio's report. He never received a response from the doctor, and he concluded that Dr. Guertin thought he could be of no help. Mr. Bain also spoke with Dr. Goldsmith, who had been helpful in cases like this one. Mr. Bain then sent Dr. Inocencio's records to Dr. Goldsmith, but when Dr. Goldsmith did not respond after several attempts to reach him, Mr. Bain concluded that Dr. Goldsmith thought he could not help the defense. Mr. Bain attempted to retain a third physician, Dr. Church, who was a pediatrician at Ford Hospital. Mr. Bain discussed Dr. Inocencio's report with Dr. Church over the telephone and asked her whether there was any other way of explaining the penetration or absence of a hymen. Dr. Church responded that the injury could be the result of being impaled on a picket fence, and Mr. Bain apparently concluded – reasonably – that this testimony would not be helpful.

The record demonstrates that the petitioner's trial attorney pursued attempts to obtain expert assistance in order to attack Dr. Inocencio's report. He made a reasonable investigation by contacting three physicians and either discussed Dr. Inocencio's findings with them or sent them Dr. Inocencio's report. His determination not to call a physician as an expert in light of the lack thereof responses and his conversation with Dr. Church was a reasonable decision.

The Michigan Court of Appeals agreed with the trial court that counsel made reasonable efforts to explore the possibility of refuting the prosecution's expert witness. The court of appeals concluded that trial counsel's performance was not deficient in his futile pursuit of a physician expert, and the Court finds that this aspect of the state court's decision was not an unreasonable application of *Strickland*.

3.

The petitioner alleges next that his trial attorney performed deficiently when he conceded that sexual abuse occurred. During opening statements, trial counsel told the jury that "it's only fair to say that something happened to this young lady. That there was a physical abuse, sexual abuse." Trial Tr. 12, Sept. 29, 2000. However, the petitioner's brief contains no argument on the claim that this admission constitutes ineffective assistance. The Court concludes, as did the Michigan Court of Appeals, that the petitioner has abandoned his claim by failing to present any argument or authority in support of this claim. *See Roberts v. Carter*, 337 F.3d 609, 613 (6th Cir. 2003) (stating that, because the habeas petitioner failed to advance any argument in support of a finding of "cause and prejudice" for his procedural default, the court considered the argument abandoned) (citing *United States v. Cofield*, 233 F.3d 405, 407 (6th Cir. 2000)).

4.

The petitioner next alleges that trial counsel should have impeached the complainant and her mother in regard to the dates on which the sexual abuse allegedly occurred. The petitioner alleges that the

victim's mother claimed the sexual abuse occurred from the spring of 1995 to December of 1998, whereas the victim testified at the preliminary examination that the charged events occurred before her automobile accident in August of 1996. The court of appeals rejected this claim. The victim testified at trial that she could not remember the date of the incident in question. The court noted that "aggressively impeaching the victim could have had a negative result – increasing the jury's sympathy for her, rather than drawing attention to the discrepancies." *Tucker*, 2003 WL 734168, at *5.

This Court concludes that the state court's decision on this issue is nether contrary to nor an unreasonable application of *Strickland* to the facts in this case. The decision to impeach the victim was a strategic choice, which is entitled to deference. Moreover, the petitioner has not identified any instance in which AT contradicted herself. Nor has the petitioner identified any such contradiction by AT's mother. The jury was made aware of the discrepancies between the testimony of two witnesses and the fact that the complainant could not remember whether she told others people the same things she told the jury. The Court does not believe that the result of the proceeding would have been different if defense counsel had persisted in pointing out inconsistencies in the testimony. Habeas relief is not warranted on this ineffective assistance of counsel claim.

B.

The petitioner also argues that he was denied a fair trial because the trial court refused to honor the jury's requests for a re-reading of trial testimony. The state

court held that the petitioner forfeited this issue because the petitioner did not object to the trial court's responses to the jury's requests. The court went on to analyze the claim for plain error and prejudice and concluded:

> Ordinarily, the decision whether to allow a jury to examine transcript testimony is left to the sound discretion of the trial court. *People v. Davis*, 216 Mich. App. 47, 56, 549 N.W.2d 1 (1996). MCR 6.414(H) states in pertinent part
>
> > If, after beginning deliberation, the jury requests a review of certain testimony or evidence, the court must exercise its discretion to ensure fairness and to refuse unreasonable requests, but it may not refuse a reasonable request. The court may order the jury to deliberate further without the requested review, so long as the possibility of having the testimony or evidence reviewed at a later time is not foreclosed.
>
> Here, it appears that the jury's requests to review the victim's testimony were reasonable. The trial court's commentary when refusing to provide the transcripts certainly implied that the jurors would not be able to review the testimony. Thus, even though the trial court stopped short of stating that review of the transcripts could never take place, the trial court's instructions may have been plainly erroneous.

However, even if plainly erroneous, defendant bears the burden of proving that his substantial rights were prejudiced by the unpreserved error. *Carines, supra* at 763, 597 N.W.2d 130. Here, there is no indication that the lack of a transcript of the victim's testimony affected the outcome of the proceedings.

One of the areas of apparent concern was whether there was any testimony supporting the charge related to digital-vaginal penetration. Ultimately, the jurors resolved this concern by acquitting defendant on the charge. Thus, defendant suffered no harm.

The other area of apparent concern was whether the victim's testimony supported the charge of pencil-anal penetration. The notes suggest that one of more jurors recalled the victim's testimony as suggesting pencil-vaginal penetration, which was inconsistent with the charge. The victim testified that defendant "shoved it [a pencil] up my private." Our review of the victim's testimony reveals that she used the word "private" broadly enough to include either "pencil-anal" or "pencil-vaginal" penetration. in light of the victim's testimonial ambiguity, we are not persuaded that a transcript of the victim's testimony would have resolved any possible confusion. At the very least, defendant has not satisfied his burden of demonstrating that the error, if any, in not providing the jury a transcript of the victim's testimony affected the outcome of the proceedings.

Tucker, 2003 WL 734168, at *1.

The respondent argues that this claim is procedurally defaulted. The doctrine of procedural default provides:

> In all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default, and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice.

Coleman v. Thompson, 501 U.S. 722, 750 (1991). Such a default may occur if the state prisoner files an untimely appeal, *ibid.*, if he fails to present an issue to a state appellate court at his only opportunity to do so, *Rust v. Zent*, 17 F.3d 155, 160 (6th Cir. 1994), or if he fails to comply with a state procedural rule that required him to have done something at trial to preserve his claimed error for appellate review, e.g., to make a contemporaneous objection or file a motion for a directed verdict. *United States v. Frady*, 456 U.S. 152, 167-69 (1982); *Simpson v. Sparkman*, 94 F.3d 199, 202-03 (6th Cir. 1996). Application of the cause and prejudice test may be excused if a petitioner "presents an extraordinary case whereby a constitutional violation resulted in the conviction of one who is actually innocent." *Rust*, 17 F.3d at 162; *see also Murray v. Carrier*, 477 U.S. 478, 496 (1986).

For the doctrine of procedural default to apply, a firmly established state procedural rule applicable to the petitioner's claim must exist, and the petitioner must have failed to comply with that state procedural rule. *Warner v. United States*, 975 F.2d 1207, 1213-14 (6th Cir. 1992). Additionally, the last state court from which the petitioner sought review must have invoked the state procedural rule as a basis for its decision to reject review of the petitioner's federal claim. *Coleman*, 501 U.S. at 729-30. "When a state court judgment appears to have rested primarily on federal law or was interwoven with federal law, a state procedural rule is an independent and adequate state ground only if the state court rendering judgment in the case clearly and expressly stated that its judgment rested on a procedural bar." *Simpson v. Sparkman*, 94 F.3d 199, 202 (6th Cir. 1996).

If the last state court from which the petitioner sought review affirmed the conviction both on the merits, and, alternatively, on a procedural ground, the procedural default bar is invoked and the petitioner must establish cause and prejudice in order for the federal court to review the petition. *Abela v. Martin*, 380 F.3d 915, 922-24 (6th Cir. 2004); *Rust*, 17 F.3d at 161. If the last state court judgment contains no reasoning, but simply affirms the conviction in a standard order, the federal habeas court must look to the last reasoned state court judgment rejecting the federal claim and apply a presumption that later unexplained orders upholding the judgment or rejecting the same claim rested upon the same ground. *Ylst v. Nunnemaker*, 501 U.S. 797, 803 (1991).

In this case, it appears that a state procedural rule was in place during the relevant time, namely that a

defendant must object at trial to preserve issues for appellate review. The contemporaneous objection rule was firmly established at the time of the petitioner's trial. *See People v. Carines*, 460 Mich. 750, 761-64, 597 N.W.2d 130, 137-38 (1999); *People v. Grant*, 445 Mich. 535, 546, 520 N.W.2d 123, 128 (1994). Therefore, the contemporaneous objection rule is an adequate and independent state ground on which to deny relief.

It also appears that the Michigan courts actually enforced the procedural rule in this case. The last state court to issue a reasoned opinion on these claims, the Michigan Court of Appeals, held that the claims were not preserved "because defendant did not object to any of the trial court's responses to the notes from the jury." *Tucker*, 2003 WL 734168, at *1. The court then reviewed the unpreserved claims for plain error, concluding that the petitioner was not prejudiced by the trial court's refusal to provide the jury with transcripts. Plain error review does not constitute a waiver of state procedural default rules. *See Hinkle v. Randle*, 271 F.3d 239, 244 (6th Cir. 2001).

Because it appears that the petitioner has procedurally defaulted these claims, the remaining question is whether the petitioner has demonstrated "cause" for the failure to adhere to the procedure in place, and "prejudice" that flows the application of the rule. *See Broom v. Mitchell*, 441 F.3d 392, 401 (6th Cir. 2006). Ineffective assistance of counsel may serve as "cause" for a procedural default if it rises to the level of a constitutional violation. *Martin v. Mitchell*, 280 F.3d 594, 605 (6th Cir. 2002). In fact, a "claim of ineffective assistance of counsel . . . can serve as both cause and prejudice, excusing a procedural default in an underlying substantive claim." *Franklin v.*

Anderson, 434 F.3d 412, 418 (6th Cir. 2006). The petitioner alleges that his trial attorney was ineffective for failing to object to the trial court's responses to the jury's request for transcripts.

As noted above, the two-prong test set forth in *Strickland v. Washington* governs claims of ineffective assistance of counsel, and it requires a showing of both deficient and prejudice. *Strickland*, 466 U.S. at 687. The Michigan Court of Appeals concluded that the petitioner was not prejudiced by the trial court's refusal to provide the jury with transcripts. This Court concludes that the Michigan Court of Appeals' decision is consistent with United States Supreme Court precedent and constitutes a reasonable application of federal law to the facts. It appears that the jury asked to hear AT's testimony again to resolve confusion over the charge contained in court four of the information, although the jury did mention "some disagreement among the jurors as to [AT]'s testimony regarding the pencil and other matters." Pet'r Br. in Mich. Ct. App. Ex. D, Jury Note. Nonetheless, the record suggests that the jurors resolved their concerns about the testimony supporting count four in the petitioner's favor, even without the transcripts. The jury also expressed confusion about the complainant's testimony on count three, which alleged that the petitioner put a pencil in her anus. However, the transcript likely would not have resolved these concerns because the complainant, as noted by the state court, used the word "privates" very broadly to mean both anus, vagina, and mouth. The following exchange took place during her testimony:

Q. What happened next?

A. He put his privates in my privates.

Q. Okay. And which privates are we talking about?

A. Front, back, and mouth.

. . .

Q. Okay. And who had the pencil?

A. My dad.

Q. What did he do with the pencil?

A. Shoved it up my private.

Trial Tr. 64, 67-68, Sept. 29, 2000. Because this testimony equally supports a finding that the petitioner inserted a pencil into the complainant's vagina or anus, the transcript would not have assisted the jury in coming to a decision. The petitioner was therefore not prejudiced by counsel's failure to object. Although both elements of the *Strickland* test must be satisfied before a constitutional violation can be found, a court need not analyze the performance element if the petitioner fails to show prejudice. *See Baze v. Parker*, 371 F.3d 310, 321 (6th Cir. 2004). The petitioner cannot overcome his procedural default based on ineffective assistance of counsel.

A petitioner may overcome a procedural default in the absence of "cause and prejudice" upon a showing of actual innocence. *Lott v. Coyle*, 261 F.3d 594, 620 (6th Cir. 2001) (citing *Schlup v. Delo*, 513 U.S. 298, 314-15 (1995), and *Herrera v. Collins*, 506 U.S. 390, 417 (1993)). The miscarriage of justice exception applies in

the extraordinary case where the habeas petitioner demonstrates that the alleged constitutional error probably resulted in the conviction of one who is actually innocent of the underlying offense. *Dretke v. Haley*, 541 U.S. 386, 388 (2004); *Murray v. Carrier*, 477 U.S. at 496. "'[A]ctual innocence' means factual innocence, not mere legal insufficiency." *Bousley v. United States*, 523 U.S. 614, 623 (1998). "To be credible, [a claim of actual innocence] requires [the] petitioner to support his allegations of constitutional error with new reliable evidence – whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence – that was not presented at trial." *Schlup*, 513 U.S. at 324. "[T]he petitioner must show that it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence." *Id.* at 327. In other words, the petitioner must show "that more likely than not any reasonable juror would have reasonable doubt." *House v. Bell*, __ U.S. __, __, 126 S. Ct. 2064, 2077 (2006).

The petitioner has made no such showing in this case. Consequently, a miscarriage of justice will not occur if this Court does not adjudicate the substantive merits of his claim regarding the transcripts. The petitioner's claim is procedurally defaulted and this Court will not review it on the merits.

C.

The petitioner's third habeas claim is that the trial court erroneously admitted highly prejudicial testimony that the petitioner was a cross dresser. The petitioner contends that this evidence deprived him of his constitutional right to a fair trial and that the error

was exacerbated by the trial court's failure to give a proper limiting instruction. He argues in the alternative that defense counsel was ineffective for failing to object to the lack of a cautionary instruction regarding the evidence. The Michigan Court of Appeals concluded that the trial court did not abuse its discretion in admitting the evidence, and it concluded that defense counsel's performance was not deficient. Generally, state-court evidentiary rulings cannot rise to the level of due process violations unless they "'offend[] some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.'" *Montana v. Egelhoff*, 518 U.S. 37, 43 (1996) (quoting *Patterson v. New York*, 432 U.S. 197, 202 (1977)); *see also Spencer v. Texas*, 385 U.S. 554, 563-64 (1967); *Seymour v. Walker*, 224 F.3d 542, 552 (6th Cir. 2000).

The state appellate court reasoned the evidence of cross-dressing was part of an event that culminated in a threat by the petitioner to AT if she revealed that she saw him in women's clothing. The threats of abuse to AT's mother, the court found, was a pattern of threats to persuade AT to conceal incidents about which the petitioner did not want anyone to know. The court of appeals held that the petitioner's "pattern of threatening the victim was certainly relevant to explaining the victim's delay in reporting the abuse." *Tucker*, 2003 WL 734168, at * 2. This reasoning is sound. The petitioner's alleged threats served to explain why the victim did not tell anyone about the petitioner's conduct until years after it occurred. Moreover, the trial court offered to give a cautionary instruction stating that the petitioner's cross-dressing should not play a part in the jurors' decision. The Court concludes that the decision to admit the

evidence was not so fundamentally unfair as to deprive the petitioner of due process and that the state court's decision was not contrary to, or an unreasonable application of, clearly established federal law.

Nor did trial counsel's failure to insist on a cautionary instruction violate the petitioner's right to effective assistance of trial. Although the trial court offered to give a cautionary instruction to the jury, it did not read the instruction. The record does not explain defense counsel's subsequent failure to insist on the instruction and his failure to object to the lack of an appropriate instruction. The petitioner argues that trial counsel was ineffective for failing to object to the lack of a cautionary instruction concerning evidence of his cross-dressing.

However, the petitioner admitted at trial that he was a cross-dresser, and he claimed that he went to a therapist to try to stop doing it. He also produced a clinical psychologist who testified that there is no connection between cross-dressing and criminal sexual activity with children. Because the psychologist's testimony on this issue was not contested, it is unlikely that the petitioner's cross-dressing was relevant to the jury's decision.

The Court concludes that trial counsel's failure to request an instruction on cross-dressing and his failure to object to the lack of such an instruction may have been a strategic decision and did not constitute deficient performance. The Court further concludes that the alleged deficiency did not prejudice the defense because it did not deprive the petitioner of a trial whose result is reliable. Therefore, the state

court's conclusion was not an unreasonable application of *Strickland*.

D.

The petitioner's fourth and final claim alleges that the cumulative effect of the errors set forth in his brief deprived him of due process and his right to a fair trial. This claim has no merit because "[t]he Supreme Court has not held that distinct constitutional claims can be cumulated to grant habeas relief." *Lorraine v. Coyle*, 291 F.3d 416, 447 (6th Cir.), *opinion corrected on denial of reh'g*, 307 F.3d 459 (2002), *and cert. denied*, 538 U.S. 947 (2003). Therefore, it cannot be said that the state court's judgment was contrary to any Supreme Court decision so as to warrant habeas relief under the AEDPA.

IV.

The Court finds that trial counsel rendered ineffective assistance in failing to obtain AT's medical records. The Michigan courts' decisions to the contrary were an unreasonable application of federal law as established by the Supreme Court. The petitioner's other claims lack merit. Nonetheless, he has established that he is in custody in violation of his federal constitutional rights. *See* 28 U.S.C. § 2254(d).

Accordingly, it is **ORDERED** that the petition for writ of habeas corpus [dkt # 1] is conditionally **GRANTED**.

It is further **ORDERED** that the respondent shall release the petitioner from custody unless the State brings him to trial again within seventy days, subject

to the exclusions from such period allowed by 18 U.S.C. § 3161(h).

s/David M. Lawson
DAVID M. LAWSON
United States District Judge

Dated: October 23, 2007

[*Proof of Service omitted in printing*]

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case Number: 03-10254
Honorable David M. Lawson

[Filed October 23, 2007]

KEVIN TUCKER,	)
	)
Petitioner,	)
	)
v.	)
	)
JOHN CASON,	)
	)
Respondent.	)
	)

JUDGMENT

In accordance with the Opinion and Order Conditionally Granting Petition for Writ of Habeas Corpus entered on this day,

IT IS ORDERED AND ADJUDGED that the Petition for Writ of Habeas Corpus be, and the same hereby is, **CONDITIONALLY GRANTED.**

It is further **ORDERED** that the respondent shall release the petitioner from custody unless the State brings him to trial again within seventy days from and after this date, subject to the exclusions from such period allowed by 18 U.S.C. § 3161(h).

s/David M. Lawson
DAVID M. LAWSON
United States District Judge

Dated: October 23, 2007

[*Proof of Service omitted in printing*]

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 07-2481

[Filed October 20, 2010]

KEVIN TUCKER,	)
	)
Petitioner-Appellee,	)
	)
v.	)
	)
JOHN CASON, WARDEN,	)
	)
Respondent-Appellant.	)
	)

ORDER

BEFORE: SILER and GIBBONS, Circuit Judges; and REEVES,* District Judge.

The court having received a petition for rehearing en banc, which was circulated to all active judges of this court, none of whom requested a vote on the

* Hon. Danny C. Reeves, United States District Judge for the Eastern District of Kentucky, sitting by designation.

suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ _____

Leonard Green, Clerk

Supreme Court, U.S.
FILED
APR 18 2011
OFFICE OF THE CLERK

No. 10-835

In the Supreme Court of the United States

KEVIN TUCKER, PETITIONER

v.

JOHN CASON, WARDEN

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

1. Whether this Court should review Petitioner's fact-bound, run-of-the-mill ineffective-assistance-of-counsel claim, where Petitioner did not raise part of the claim before the Sixth Circuit Court of Appeals, the rest of the claim is of no jurisprudential significance, and Petitioner cannot demonstrate prejudice on the merits.

PARTIES TO THE PROCEEDING

Petitioner is Kevin Tucker, who was convicted in a Michigan court of three counts of first-degree criminal sexual conduct against his five-year-old daughter, AT. Respondent John Cason was the warden of the prison where Petitioner is serving his sentence.[1]

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[1] Petitioner's current warden is Willie Smith.

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I. Part of the claim that Tucker presents to this Court was neither before nor considered by the Sixth Circuit Court of Appeals. 9

II. This Court should decline to review Tucker's fact-specific ineffective assistance of counsel claim 10

A. Tucker's fact-bound claim has no jurisprudential significance 10

B. Tucker has failed to allege a split in the circuits, or that the Sixth Circuit's decision conflicts with *Strickland*. Nor does he present a novel or important question of federal law 12

III. Certiorari should be denied because Tucker's underlying claim lacks merit. 12

A. In this habeas case, the State court's merits adjudication should have been accorded deference under AEDPA. 13

B. Even if Tucker's claim was reviewed de novo, it would still fail, as the Sixth Circuit properly found no prejudice. 20

CONCLUSION 22

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OPINIONS BELOW

On March 4, 2003, in an unpublished opinion, the Michigan Court of Appeals affirmed Petitioner Tucker's convictions on three counts of first-degree criminal sexual conduct. *People* v. *Tucker*, 2003 WL 734168 (Mich. Ct. App. 2003). On September 25, 2003, the Michigan Supreme Court denied Tucker's application for leave in a summary order. *People* v. *Tucker*, 669 N.W.2d 816 (Mich. 2003).

Tucker timely filed a petition for writ of habeas corpus. In an October 23, 2007 Opinion and Order, the district court granted habeas relief on Tucker's claim that defense counsel was ineffective for failing to obtain medical records from the victim's August 1996 automobile accident. Pet. App. 15a–66a. In an August 3, 2010 Opinion, the Sixth Circuit Court of Appeals reversed the district court's grant of habeas relief in a unanimous, unpublished opinion. Pet. App. 1a–14a. The Sixth Circuit denied rehearing and rehearing en banc on October 20, 2010. Pet. App. 69a.

JURISDICTION

The State of Michigan agrees that Tucker timely filed a petition for certiorari.

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The relevant constitutional provision is set forth in Tucker's petition. Pet. 1–2.

Also relevant is 28 U.S.C. § 2254(d)(1) of the Antiterrorism and Effective Death Penalty Act

(AEDPA), which provides that an application for a writ of habeas corpus:

> shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim. . . resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.

28 U.S.C. § 2254(e)(1) of AEDPA provides:

> In a proceeding initiated by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

INTRODUCTION

This Court should deny Tucker's petition for certiorari for four reasons. First, Tucker claims that his counsel was ineffective for failing to obtain another doctor to refute the State doctor's report. But that claim was never before the Sixth Circuit. To the contrary, both the district court and the Sixth Circuit specifically denied a certificate of appealability on this claim. Because this portion of Tucker's claim, which is woven throughout his petition, was neither before nor considered by the Sixth Circuit, it is unpreserved, making the petition a poor vehicle to address the other fact-based issues that Tucker raises.

Second, the remaining portion of Tucker's question presented does not raise a cert-worthy issue. Instead, Tucker treats this Court as an additional appellate error-correcting forum. He neither alleges a split in the circuits regarding his claim, nor does he establish that this case presents a novel and important question of federal law. The Sixth Circuit's opinion reveals that it unremarkably applied the correct standard in concluding that Tucker was not prejudiced. Tucker's claim represents nothing more than dissatisfaction with the Sixth Circuit's fact-bound determination of no prejudice. A petition for certiorari is "rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law," Sup. Ct. R. 10, yet that is precisely the error Tucker alleges in his petition.

Third, the issue that Tucker seeks to present is of no jurisprudential significance and unlikely to affect the interests of anyone other than Tucker. Because Tucker has failed to articulate a "compelling reason"

under Rule 10 for this Court to grant certiorari review, this Court should deny the petition.

Finally, this Court should deny Tucker's petition because the underlying claim lacks merit. Under the appropriate standard of review, Tucker is not entitled to relief. Because the State court addressed the merits of Tucker's ineffective assistance claim, the pivotal question under AEDPA is whether the State court's decision was an unreasonable application of *Strickland* v. *Washington*, 466 U.S. 668 (1984). This standard, described by this Court as "difficult to meet," *Cullen* v. *Pinholster*, __ U.S. __; 2011 WL 1225705, * 8 (quoting *Harrington* v. *Richter*, 131 S. Ct. 770, 786 (2011)), was not met here. Tucker has not shown that the State court's decision was "so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Richter*, 131 S. Ct. at 786–787.

While the State court's decision should not have been deemed "contrary to" *Strickland* and considered de novo by the Sixth Circuit, the Sixth Circuit nevertheless reached the right result in concluding that Tucker was not prejudiced.

STATEMENT OF THE CASE[2]

The jury was presented with the following four counts of first-degree criminal sexual conduct against Tucker: I) penile/oral penetration; II) penile/anal penetration; III) foreign object/anal penetration; and IV) digital/vaginal penetration. (10/2/00, 57–59.) The acts were alleged to have occurred sometime in the summer of 1996, when the victim, AT, was five-years-old, shortly before Tucker and AT were in an automobile accident in mid-August.

At trial, AT testified that Tucker, while at their home, did some things to her that made her feel uncomfortable. She and Tucker were home alone watching television when Tucker instructed her to remove her clothes. She complied, and he removed his own clothes. Then, Tucker put his "private" part in her vagina, anus, and mouth. After Tucker put his private in her mouth, she felt something "liquidy," like he had "peed" in her mouth. (9/29/00, 60–65.) Tucker then got a pencil from a cup in the kitchen where the pencils were kept and "shoved" the eraser end "up [her] private." AT started crying and Tucker said "Shut up, you big whiney baby." (9/29/00, 66–69.) AT did not tell her mother right away because Tucker had threatened to hit her mom if AT told. Tucker made another threat when AT saw him wearing women's clothes. AT was scared that Tucker would hit her mom. (9/29/00, 69–73.)

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[2] Respondent set forth a more-detailed summary of the facts regarding the trial and evidentiary hearing in its initial brief to the Sixth Circuit.

Dr. Jay Eastman, a pediatrician specializing in the examination of child-abuse victims, testified as an expert for the prosecution. (9/29/00, 99.) He had not examined AT but had reviewed a report prepared by his colleague, Dr. Norma Inocencio, following her examination of AT in October 1999, after the abuse allegations came to light. (9/29/00, 100–01.) Dr. Eastman testified that Dr. Inocencio's findings of irregularities in AT's hymen and anus were "compatible with sexual abuse." (9/29/00, 103–06.) On cross-examination, defense counsel asked Dr. Eastman if he was aware that AT had been in a serious accident. Dr. Eastman responded that he knew about the accident and believed AT had suffered a broken leg, but he was unsure of her other injuries. Dr. Eastman acknowledged that medical records from the accident might be important for purposes of a sexual abuse examination if, for example, the accident had involved "a penetrating injury to the vagina." [3] (9/29/00, 108–09.)

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[3] As the Sixth Circuit pointed out, AT sustained pelvic injuries in the accident, which occurred in mid-August 1996, and experienced vaginal bleeding as a result of her injuries. To determine the cause of the bleeding, doctors performed manual explorations of her vagina, and a vaginoscopy. Pet. App. 3a. According to the deposition of Dr. Stephen Guertin, these procedures entailed the insertion of a finger or medical instrument across AT's hymen into her vagina, which could have resulted in hymenal trauma. (Dep. 9/17/01, 27–29.) This information was not presented to the jury, presumably because counsel—who, as Respondent argued below, did not know or have any reason to believe that any injuries that AT may have sustained from the automobile accident were in any way similar to injuries indicative of sexual assault—had not obtained AT's medical records from the accident. Pet. App. 3a.

Also testifying at trial was AT's mother, who testified about AT's disclosure of the assaults, and Sam Sargente, who was married to Tucker's ex-wife's sister. Sargente worked with Tucker and recalled a conversation he and Tucker had, with Tucker eventually telling him that the only thing he ever did to AT was put two of his fingers in warm water and then put them in AT's vagina to rinse her out. Tucker held up his two fingers in the air when he told Sargente this. (9/29/00, 140–41.)

Tucker testified, giving the jury the opportunity to assess his credibility. Tucker denied doing anything to AT. (9/29/00, 152.) Tucker admitted talking to Sargente but denied telling him about washing AT's vagina. Tucker surmised that Sargente may have been confused because Tucker did tell him of a cayenne pepper incident involving AT whereby Tucker put cayenne pepper on his finger and placed his finger on AT's tongue for sassing him. (9/29/00, 165–71.)

Also testifying for the defense was Tucker's sister, his mother, and several acquaintances, as well as an expert who testified about cross-dressing and sex abuse allegations. (9/29/00, 212–26.)

At one point, during defense counsel's extensive closing argument, he pointed to Dr. Inocencio's failure to review those records, and asked the jury, "might that not be important to review reports? Do we know that something of that nature didn't happen during the course of the accident?" (10/2/00, 39–40.) In rebuttal, the prosecution replied, in part, that there was no testimony that "when [AT] was in this car accident she was penetrated by something." (10/2/00, 44–45.)

The jury convicted Tucker on the first three counts of first-degree criminal sexual conduct, but found him not guilty of digital/vaginal penetration. Tucker received concurrent sentences of 85-to-240 months of incarceration on each count.

Tucker moved for an evidentiary hearing and a new trial, arguing that his defense counsel was ineffective because he had not obtained AT's medical records from the automobile accident. The trial court granted Tucker an evidentiary hearing. Tucker called four witnesses at the hearing: defense counsel, Tucker's sister and her husband, and Dr. Inocencio, who had since reviewed AT's emergency room records from the accident.[4] The pertinent portions of Dr. Inocencio's testimony are discussed below.

Following the hearing, the trial court determined that defense counsel's failure to obtain the medical records did not fall below an objective standard of reasonableness, and denied Tucker's motion for a new trial.

The Michigan Court of Appeals and Michigan Supreme Court affirmed Tucker's convictions.

In October 2003, Tucker filed a petition for writ of habeas corpus. The district court found merit in Tucker's ineffective assistance claim with respect to his counsel's failure to obtain the medical records and granted habeas relief. The Sixth Circuit reversed.

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[4] AT was treated at Mount Clemens General Hospital immediately following the accident. She was then transferred to Children's Hospital. Dr. Inocencio reviewed only the Mount Clemens records. (9/29/01, 57, 67.)

REASONS FOR DENYING THE PETITION

This fact-based case does not warrant this Court's intervention. The State respectfully requests that certiorari be denied for the following reasons.

I. Part of the claim that Tucker presents to this Court was neither before nor considered by the Sixth Circuit Court of Appeals.

Tucker's question presented raises two different claims of ineffective assistance of trial counsel: that counsel was ineffective for failing to obtain medical records from the victim's automobile accident, and that counsel was ineffective for failing to obtain another doctor to refute Dr. Inocencio's report. The problem with the latter claim—which is woven throughout the petition—is that it was never properly before the Sixth Circuit.

While Tucker raised the claim in his habeas petition, the district court denied relief, noting that the record showed that counsel had indeed pursued attempts to obtain expert assistance to attack Dr. Inocencio's report. Pet. App. 52a. When Tucker attempted to raise this claim in the Sixth Circuit in a cross-appeal, the Sixth Circuit remanded the matter to the district court to determine whether a certificate of appealability should be granted.[5] The district court specifically denied a certificate of appealability on this claim. Resp. Brf. App. 3a–4a. The Sixth Circuit also denied Tucker a certificate of appealability on this

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[5] In habeas cases, a petitioner has no automatic right to appeal a district court's denial of the petition. Instead, a petitioner must first seek and obtain a certificate of appealability. 28 U.S.C. § 2253; *Miller-El* v. *Cockrell*, 537 U.S. 322, 327 (2003).

particular claim. Resp. Brf. App. 7a. Because this portion of Tucker's petition was neither before nor considered by the Sixth Circuit, it is unpreserved and this Court should not consider it. *Meyer* v. *Holley*, 537 U.S. 280, 291 (2003) ("[I]n the absence of consideration of . . . matter by the Court of Appeals, we shall not consider it."); *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147, n.2 (1970) ("Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them.")[6]

II. This Court should decline to review Tucker's fact-specific ineffective assistance of counsel claim.

Tucker asserts that counsel was ineffective for failing to obtain medical records at the time of trial. Tucker's claim is simply a request for this Court to review the fact-bound determination of the Sixth Circuit. As such, the question presented is not worthy of certiorari review.

A. Tucker's fact-bound claim has no jurisprudential significance.

Tucker raises a run-of-the-mill ineffective assistance claim, asserting that this case concerns the "improper application" of *Strickland*. Pet. 2. But the Sixth Circuit's opinion reveals no such misapplication.

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[6] Even if considered, the State court's decision on this claim was not an unreasonable application of *Strickland*, as even the district court found. To the extent that Petitioner suggests that counsel was ineffective for conceding that sexual abuse occurred (Pet. 13), this claim, too, was neither before nor considered by the Sixth Circuit.

Rather, the Sixth Circuit unremarkably applied the correct standard in concluding that Tucker was not prejudiced by his counsel's conduct. The medical records had no relevance whatsoever to the penile/oral penetration charge of which Tucker was convicted. To the extent that the records may have shown an alterative explanation for the injuries to AT's genitals, Tucker was acquitted of the one charge to which such an alternative explanation would have been relevant: the digital/penetration charge. And with respect to the two charges involving anal penetration of which Tucker was convicted, the Sixth Circuit correctly determined that the medical records would have been of little, if any, help in countering the medical evidence presented at trial and, in fact, would not have supported the argument that the injuries noted by Dr. Inocencio were the result of the accident and not sexual abuse.

While Tucker may be unsatisfied with the Sixth Circuit's decision, the Sixth Circuit's fact-bound finding is not a cert-worthy issue. Supreme Court Rule 10 states that "[a] petition for a writ of certiorari [will] rarely [be] granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Sup. Ct. Rule 10. Yet those are precisely the errors that Tucker asserts in his petition.

B. Tucker has failed to allege a split in the circuits, or that the Sixth Circuit's decision conflicts with *Strickland*. Nor does he present a novel or important question of federal law.

A core ground for granting certiorari is a conflict among the courts of appeals, or a conflict with a decision of this Court. Sup. Ct. Rule 10(a). But Tucker does not allege that there is a split in the circuits regarding his ineffective assistance of counsel claim. Nor does Tucker demonstrate that the Sixth Circuit's decision conflicts with decisions from this Court, or presents a novel and important question of federal law. The issue that Tucker seeks to present is of limited importance and unlikely to affect the legal interests of anyone other than himself. Because Tucker has failed to articulate a "compelling reason" under Rule 10 for this Court to grant certiorari review, this Court should deny the writ.

III. Certiorari should be denied because Tucker's underlying claim lacks merit.

Tucker argues primarily that counsel was deficient in failing to obtain the victim's medical records. The State does not disagree with Tucker's general assertion that a trial attorney may be deemed deficient on the basis of inadequate investigation, Pet. 6, but that is not what happened here, as the State court reasonably determined. And regardless of whether defense counsel's performance was deficient in the instant case, Tucker cannot show the requisite prejudice, whether review is under AEDPA or de novo.

A. In this habeas case, the State court's merits adjudication should have been accorded deference under AEDPA.

Where the State court adjudicated the merits of Tucker's ineffective assistance of counsel claim, and where its decision was not contrary to *Strickland*, the Sixth Circuit, on habeas review, should have accorded deference to that decision under AEDPA. Despite this, the Sixth Circuit nevertheless reached the right result on de novo review in concluding that Tucker could not meet *Strickland*'s prejudice prong.

There is no question that the State court addressed the merits of Tucker's ineffective assistance claim.[7] A State court's adjudication on the merits is entitled to deference and analyzed under the "unreasonable application" standard, unless it is "contrary to" clearly established federal law, as determined by this Court. 28 U.S.C. § 2254(d)(1). "A state court's decision is 'contrary to' . . . clearly established law if it 'applies a rule that contradicts the governing law set forth in [Supreme Court cases]' or if it 'confronts a set of facts that are materially indistinguishable from a decision of [the Supreme] Court and nevertheless arrives at a result different from [this] precedent.'" *Mitchell* v. *Esparza*, 540 U.S. 12, 15–16 (2003) (per curiam)

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[7] Indeed, this Court in *Richter* said that "[w]hen a federal claim has been presented to a state court and the state court has denied relief, it may be presumed that the state court adjudicated the claim on the merits in the absence of any of any indication or state-law procedural principles to the contrary." And § 2254 "does not require a state court to give reasons before its decision can be deemed to have been 'adjudicated on the merits.'" *Richter*, 131 S. Ct. at 784–85.

(quoting *Williams* v. *Taylor*, 529 U.S. 362, 405–06 (2000)). A State court adjudication that is "contrary to" controlling federal law is reviewed de novo by the federal court.

In this case, the Sixth Circuit deemed the State court's decision "contrary to" *Strickland*. This Court has rejected such an overly critical review by a federal appeals court before.[8] *Woodford* v. *Visciotti*, 537 U.S. 19 (2002) (per curiam). In the present case, before addressing Tucker's claim, the State court stated that "[a] successful claim of ineffective assistance of counsel requires a defendant to show that counsel's performance was deficient and that there is a reasonable probability that, but for the deficiency, this factfinder would not have convicted the defendant." *People* v. *Tucker*, 2003 WL 734168, *2 (Mich. Ct. App. 2003). This is the correct standard, consistent with *Strickland*. Although the State court later articulated the standard in a less precise form, in the context of finding no prejudice, the State court's opinion was not a repudiation of *Strickland*.

A review of the entire opinion reveals that the State court understood the correct standard. The Sixth Circuit's readiness to attribute error to the State court is inconsistent with the "presumption that State courts know and follow the law," *Woodford*, 537 U.S. at 24; see also *Holland* v. *Jackson*, 542 U.S. 649, 655 (2004),

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[8] In *Woodford*, 537 U.S. at 23–24, this Court held that the Ninth Circuit had mischaracterized the state court opinion in finding that it used the wrong standard to determine prejudice. This Court took issue with the Ninth Circuit's readiness to attribute error to the state court's reasoning, and found it inconsistent with the presumption that state courts know and follow the law.

and "also incompatible with § 2254(d)'s 'highly deferential standard for evaluating state-court rulings,' which also demands that State court decisions be given the benefit of the doubt." *Woodford*, 537 U.S. at 24 (internal citations omitted).

Because the State applied the correct legal rule in considering Tucker's run-of-the-mill, ineffective-assistance claim, the question in this case should have been whether the State court's adjudication involved an unreasonable application of clearly established Supreme Court precedent. *Williams* v. *Taylor*, 529 U.S. 362, 406 (2000) (O'Connor, J., concurring (speaking for a majority of the Court)) (a run-of-the-mill state court decision applying the correct legal rule from Supreme Court cases to the facts of a particular case does not fit within 28 U.S.C. § 2254(d)(1)'s "contrary to" clause and should be reviewed under the "unreasonable application" clause.) This is a difficult standard for Tucker to meet.

Under *Strickland*, a defendant must show that counsel's performance was deficient and resulted in prejudice, or, that but for counsel's errors, there is a reasonable probability that the result of the proceeding would have been different. *Strickland*, 466 U.S. at 687, 694. To show prejudice requires a "substantial," not just "conceivable" likelihood of a different result. *Pinholster*, 2011 WL 1225705, at *12 (quoting *Richter*, 131 S. Ct. at 792.) "Surmounting *Strickland*'s high bar is never an easy task." *Padilla* v. *Kentucky*, 130 S. Ct. 1473, 1485 (2010). "Establishing that a state court's application of *Strickland* was unreasonable under § 2254 is all the more difficult." *Richter*, 131 S. Ct. at 788. This Court has recognized that "[t]he standards

created by *Strickland* and § 2254 are both 'highly deferential,'" *Richter*, 131 S. Ct. at 788 (quoting *Strickland*, 466 U.S. at 689), and "when the two apply in tandem, review is 'doubly' so."[9] *Richter*, 131 S. Ct. at 788 (quoting *Knowles* v. *Mirzayance*, 129 S. Ct. 1411, 1413 (2009)).

The question on habeas is not whether a federal court believes the State court's determination of *Strickland* "was incorrect but whether that determination was unreasonable—a substantially higher threshold." *Knowles*, 129 S. Ct. at 1420 (quoting *Shriro* v. *Landrigan*, 550 U.S. 465, 443 (2007)). And because the *Strickland* standard is a general standard, this Court has said that a State court "has even more latitude to reasonably determine that a defendant has not satisfied that standard." *Knowles*, 129 S. Ct. at 1420; see also *Renico* v. *Lett*, 130 S. Ct. 1855, 1864 (2010); *Yarborough* v. *Alvarado*, 541 U.S. 652, 664 (2004) ("[E]valuating whether a rule's application was unreasonable requires considering the rule's specificity. The more general the rule, the more leeway courts have in reaching outcomes in case-by-case determinations"). Under the doubly-deferential judicial review that applies to a *Strickland* claim evaluated

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[9] This Court has recently reiterated that obtaining relief on habeas is difficult: "Section 2254(d) reflects the view that habeas corpus is a guard against extreme functions in the state criminal justice systems, not a substitute for ordinary error correction through appeal . . . . As a condition for obtaining habeas corpus from a federal court, a state prisoner must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Richter*, 131 S. Ct. at 786-787.

under the § 2254(d)(1) standard, Tucker's ineffective assistance claim fails.

It was hardly unreasonable for the State court to conclude that Tucker failed to show prejudice.[10] The records would only have presented an alternative explanation for the victim's physical condition—they would not have called into question the victim's compelling testimony against Tucker. The record before the State court reasonably supported its denial of Tucker's ineffective assistance of counsel claim. Tucker has failed to show that the State court's application of the especially broad standard of *Strickland* was unreasonable.

Supporting the State court's finding is the decision of the Sixth Circuit, which also found no prejudice. In granting habeas relief, the district court found it significant that the jury heard "no alternative explanation for the injuries to AT's genitals." Pet. App. 50a. But the Sixth Circuit rightly noted that:

> [Tucker] was acquitted of the one charge to which such an alternative explanation would have been relevant: the digital/vaginal penetration charge. Thus, presentation of evidence that the doctors treating AT after the car accident inserted fingers and medical instruments into her vagina to determine the cause of the vaginal bleeding, would not likely

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[10] The State court also reasonably concluded that counsel's failure to obtain the medical records from AT's automobile accident did not constitute deficient performance. But the deficient performance prong need not be considered because Petitioner cannot show prejudice.

> have resulted in a more favorable outcome for [Tucker].

Pet. App. 11a (internal quotations omitted). In other words, the medical records had no relevance to Tucker's actual conviction for penile/oral penetration.

The only other information in the medical records of potential relevance to the charges of which Tucker was convicted is a notation that AT had "good sphincter tone" following the automobile accident. The Sixth Circuit noted that:

> At first glance, this notation, as well as the absence of any indication of trauma to AT's anus at the time of the accident, appears to contradict Dr. Inocencio's later finding that AT had deep anal fissures consistent with sexual abuse. However, Dr. Inocencio testified at the evidentiary hearing that sexual abuse would not necessarily affect a child's sphincter tone; rather, sphincter tone would only be damaged in cases of severe abuse involving the use of force. Moreover, according to Dr. Inocencio, sphincter tone is better determined through the use of a colposcope, a procedure generally not undertaken in emergency room examinations.

Pet. App. 11a–12a.[11]

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[11] The Sixth Circuit also pointed out that, under Michigan law, the State was not required to prove that Petitioner penetrated AT forcefully. The applicable statutory definition of "sexual penetration" includes "any . . . intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of another person's body." Pet. App. 12a.

More significant, the Sixth Circuit noted that the medical records provided no alternative explanation for the anal fissures noted in Dr. Inocencio's report. Pet. App. 12a. Dr. Inocencio testified that there "definitely" would have been an indication in the medical records if anal bleeding or fissures had been observed following the automobile accident. (8/29/01, 61.)

Dr. Stephen Guertin, a child abuse expert who reviewed the accident records after trial, found nothing of significance in the records with respect to the anal-penetration charges. But as the Sixth Circuit noted:

> While the absence of anal trauma after the accident tends to undermine the State's theory as to when the abuse occurred, it is even more damaging to an argument that the injuries noted by Dr. Inocencio were the result of the accident and not sexual abuse. Thus, the hospital records would have been of little, if any, help in countering the medical evidence presented by Dr. Eastman regarding the anal-penetration charges and, in fact, would not have supported the argument [Tucker] now contends his trial counsel should have pursued.

Pet. App. 12a.

The Sixth Circuit correctly concluded that given (1) the relatively brief direct-examination testimony of Dr. Eastman regarding AT's anal injuries, (2) Dr. Inocencio's evidentiary hearing testimony that good sphincter tone is not necessarily inconsistent with sexual abuse, and (3) the lack of any other information contained in the medical records relevant to the charges of conviction, it was not reasonably probable

that the jury would have reached a different conclusion had the records been presented at trial. Pet. App. 14a. Defense counsel's failure to obtain the records therefore resulted in no prejudice.[12]

B. Even if Tucker's claim was reviewed de novo, it would still fail, as the Sixth Circuit properly found no prejudice.

Although the Sixth Circuit should have given deference to the State court's decision, the Sixth Circuit nevertheless reached the right result on de novo review by concluding that Tucker could not meet *Strickland's* prejudice prong.

The Sixth Circuit indisputably applied the correct *Strickland* standard when considering Tucker's ineffective assistance claim. That is, to show prejudice under *Strickland*, Tucker must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. Notably, a showing of prejudice requires a "substantial," not just "conceivable," likelihood of a different result. *Pinholster*, 2011 WL 1225705, at *12 (quoting *Richter*, 131 S. Ct. at 792). *Strickland*'s bar is "high" and surmounting it "is never an easy task." *Padilla*, 130 S. Ct. at 1485.

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[12] The Sixth Circuit did not address the deficient performance prong of *Strickland* because it was not required to do so. If a defendant suffered no prejudice, it is irrelevant whether counsel's performance was deficient. Recognizing that this will often be the case, this Court has instructed that "there is no reason" to address the performance aspect first "or even to address both components of the inquiry if the defendant makes an insufficient showing on one." *Strickland*, 466 U.S. at 697.

The Sixth Circuit's unremarkable application of *Strickland* and its fact-bound determination of no prejudice was adequately supported by the record. As noted above, the medical records had no relevance to the penile/oral penetration charge of which Tucker was convicted. To the extent that the records may have shown an alterative explanation for the injuries to AT's genitals, Tucker was acquitted of the digital/penetration charge—the one charge to which such an alternative explanation would have been relevant. And with respect to the two charges involving anal penetration of which Tucker was convicted, the Sixth Circuit correctly determined that the medical records would have been of little, if any, help in countering the medical evidence presented at trial and, in fact, would not have supported the argument that the injuries noted by Dr. Inocencio were the result of the accident and not sexual abuse. The petition for writ of certiorari should be denied.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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Dated: APRIL 2011

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

KEVIN TUCKER,

Petitioner,

v. Case No, 03-10254

Honorable David M. Lawson

JOHN CASON,

Respondent.

_____ /

ORDER DENYING CERTIFICATE OF APPEALABILITY

This matter is before the Court on remand from the Sixth Circuit for the sole purpose of determining whether to grant or deny a certificate of appealability to the petitioner. The Court already issued a conditional writ of habeas corpus with respect to one of the petitioner's claims of ineffective assistance of counsel on October 23, 2007. The Court was persuaded that trial counsel rendered ineffective assistance when he failed to obtain medical records of injury to the victim's pelvis and vagina that happened before the alleged sexual assault and that could have provided an alternative explanation for the victim's hymen and anal tissue abnormalities that were critical in convicting the petitioner of sexual molestation. Accordingly, the Court ordered a conditional grant of the petition for writ of habeas corpus under the terms of which the respondent would be released unless the state chose to retry him within seventy days.

Originally, the petitioner advanced four claims for habeas corpus relief. These grounds were:

> I. The trial court reversibly erred in refusing the jury's reasonable requests for the rereading of trial testimony, in violation of the right to due process and a fair trial, and defense counsel was ineffective for failing to object.
>
> II. Defense counsel was ineffective for failing to have Dr. Inocencio's report and the photographs taken during her examination reviewed by another doctor, for failing to obtain the medical records from [the complainant's] automobile accident, for conceding that sexual abuse occurred, for eliciting testimony that [the complainant's] previous statements and testimony were consistent with her trial testimony, when they were inconsistent, and for failing to impeach witnesses with prior inconsistent testimony.
>
> III. The petition should be granted where the court permitted highly prejudicial testimony that Mr. Tucker was a cross dresser over defense objection, without giving a cautionary instruction, despite the court's intention to do so, and, in the alternative, defense counsel was ineffective for failing to object to the failure to give a cautionary instruction.
>
> IV. The cumulative effect of these errors denied due process and the right to a fair trial.

Opinion & Order Conditionally Granting Petition for Writ of Habeas Corpus [dkt # 26], at 14. As mentioned above, the Court found that only the trial counsel's failure to investigate the circumstances of the victim's automobile accident and obtain medical records of her treatment

warranted habeas corpus relief; as to the other grounds, the Court held that the petitioner's arguments lacked merit. Both parties cross-appealed from the Court's order.

I.

A certificate of appealability may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). "Where a district court has rejected the constitutional claims on the merits, the showing required to satisfy § 2253(c) is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong," *Slack v. McDaniel*, 529 U.S. 473, 484 (2000), or that the issues presented were "adequate to deserve encouragement to proceed further." *Miller-El* v. *Cockrell*, 537 U.S. 322, 336 (2003) (internal quotations omitted).

District courts must make an "individualized determination" under the standards set forth in *Slack* and *Miller-El* as to each substantive claim presented by the petitioner. *Murphy v. Ohio*, 263 F.3d 466, 467 (6th Cir. 2001). The Court must either issue a certificate of appealability indicating which issues satisfy the required showing or provide reasons why such a certificate should not issue. 28 U.S.C. § 2253(c)(3); Fed. R. App. P. 22(b); *In Re Certificates of Appealability*, 106 F.3d 1306, 1307 (6th Cir. 1997).

II.

Apart from the willing argument, the petitioner made four more ineffective assistance of counsel claims, all of which were found to be without merit by the Court. They alleged: (1) the failure of trial counsel to have Dr. Inocencio's report and photographs reviewed by another doctor; (2) trial counsel's concession that sexual abuse

occurred; (3) elicitation by counsel of testimony that the complainant's previous statements and testimony were consistent with her trial testimony; and (4) the failure to impeach witnesses with prior inconsistent testimony.

On the first of those claims – that the petitioner's counsel should have asked other physicians to review Dr. Inocencio's findings – the Court found that the trial attorney pursued attempts to obtain expert assistance in order to attack Dr. Inocencio's report. Counsel apparently contacted three physicians seeking to rebut Dr. Inocencio's testimony but in light of their responses or lack thereof, his determination not to call a physician as an expert did not amount to conduct that fell below the generous standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). Secondly, regarding the concession of guilt, the Court concluded that the argument was abandoned because the petitioner failed to develop it or present any authority to support the claim in his briefs. And regarding the third claim, that counsel should have impeached the victim and her mother with regard to the dates on which the sexual abuse allegedly occurred, the Court upheld the Michigan court of appeals' conclusion that such move was neither contrary to nor an unreasonable application of *Strickland* to the facts of this case because failure to impeach the victim and her mother did not result in prejudice to the defendant. Having revisited the petitioner's unsuccessful ineffective assistance of counsel claims, the Court now finds that reasonable jurists could not debate that this Court correctly dismissed the petitioner's first claim or that the issues presented were adequate to deserve encouragement to proceed further.

III.

The petitioner also argued that he was denied a fair trial because the trial court refused to honor the jury's requests to reread trial testimony. The Court found that

this claim was procedurally defaulted and upheld the Michigan court of appeals' decision that the petitioner was not prejudiced by the trial court's refusal to provide the jury with the transcripts. Further, the Court did not find any miscarriage of justice to overcome a procedural default in the absence of cause and prejudice. The Court now concludes that the petitioner has not satisfied the standard for issuance of a certificate of appealability on this claim either.

IV.

The petitioner's next claim for habeas corpus relief is that the trial court erroneously admitted highly prejudicial testimony that the petitioner was a cross dresser without giving a limiting instruction and without trial counsel requesting it. The Court found that as a matter of trial tactics, these decisions did not constitute deficient performance, and did not prejudice the defense in a way that would deprive the petitioner of the reliable trial. After considering this claim again, the Court concludes that reasonable jurists could not debate that this Court correctly dismissed the petitioner's evidentiary mistake claim and the claim does not deserve encouragement to proceed further.

V.

The petitioner's final claim was based on the cumulative effect of the enumerated errors in depriving him of due process and fair trial. The Court rejected that claim as well based on the Supreme Court's holding that distinct violations may not be cumulated for the purposes of receiving habeas relief. The Court now concludes that this proposition is likewise not debatable by reasonable jurists and that the petitioner failed to make a substantial showing of the denial of a constitutional right that would entitle the petitioner to proceed.

Accordingly, it is **ORDERED** that a certificate of appealability to proceed on the claims other than ineffective assistance of counsel for failing to investigate the alternative causes of victim's injuries is **DENIED.**

s/David M. Lawson

DAVID M. LAWSON

United States District Judge

Dated: September 23, 2008

Certificate of Service

I hereby certify that on September 23, 2008, I electronically filed the foregoing with the Clerk of the Court using the ECF system, and I further certify that I mailed a copy to the non-ECF participant(s).

s/ Felicia M. Moses

No. 08-1089

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

KEVIN TUCKER

Petitioner-Appellee/Cross-Appellant,

v.

FILED
Jan 12, 2009
LEONARD GREEN, Clerk

JOHN CASON, Warden,

Respondent-Appellant/Cross-Appellee.

Kevin Tucker, a Michigan prisoner proceeding through counsel, appeals the district court's partial denial of his petition for a writ of habeas corpus filed pursuant to 28 U.S.C. § 2254. Tucker's appellate brief has been construed as an application for a certificate of appealability.

In 2000, a jury convicted Tucker of three counts of first-degree criminal sexual conduct involving a minor. He was sentenced to 85 to 240 months in prison. Tucker moved for a new trial, asserting that trial counsel (Mr. Bain) had rendered ineffective assistance by failing to obtain the complainant's medical records from an automobile accident. After conducting an evidentiary hearing, the trial court denied the motion. The Michigan Court of Appeals affirmed Tucker's convictions on direct appeal on March 4, 2004. *People* v. *Tucker*, No. 232094, 2003 WL734168 (Mich. Ct. App. Mar. 4, 2003). On September 25, 2003, the Michigan Supreme Court denied leave to appeal.

In his § 2254 petition, Tucker asserted that:

I. The trial court reversibly erred in refusing the jury's reasonable requests for the rereading of trial testimony, in violation of the right to due process and a fair trial, and defense counsel was ineffective for failing to object.

II. Defense counsel was ineffective for failing to have Dr. Inocencio's report and the photographs taken during her examination reviewed by another doctor, for failing to obtain the medical records from [the complainant's] automobile accident, for conceding that sexual abuse occurred, for eliciting testimony that [the complainant's] previous statements and testimony were consistent with her trial testimony, when they were inconsistent, and for failing to impeach witnesses with prior inconsistent testimony.

III. The petition should be granted where the court permitted highly prejudicial testimony that Mr. Tucker was a cross dresser over defense objection, without giving a cautionary instruction, despite the court's intention to do so, and, in the alternative, defense counsel was ineffective for failing to object to the failure to give a cautionary instruction.

IV. The cumulative effect of these errors denied due process and the right to a fair trial.

The state filed an answer, and Tucker filed a reply.

Upon review, the district court granted a conditional writ of habeas corpus with respect to the part of the second claim asserting that trial counsel rendered ineffective assistance by failing to obtain the medical records from the complainant's automobile accident.

The district court denied the petition as to the other claims. The first claim was procedurally defaulted because counsel had failed to object to the trial court's responses at trial, and Tucker did not demonstrate that counsel's failure to do so had prejudiced him. *See Baze v. Parker*, 371 F.3d 310, 321 (6th Cir. 2004).

The remainder of the second claim lacked merit in part and was procedurally defaulted in part. Tucker argued that review of Dr. Inocencio's report by another doctor would have revealed a normal examination with possible irregularities caused by the automobile accident. However, counsel had attempted to have other doctors review Dr. Inocencio's report. Two did not respond to phone calls after receiving a copy of the report, and the third indicated on the phone that the type of injuries suffered by the complainant alternatively could have been caused by impalement on a picket fence. Counsel thus conducted a reasonable investigation and made a reasonable conclusion that expert testimony by another doctor would not have been helpful. *See Strickland v. Washington*, 466 U.S. 668, 691 (1984).

The portion of the second claim challenging counsel's concession of sexual abuse at trial was procedurally defaulted as Tucker failed to present any argument in support of his claim. *See Roberts v. Carter*, 337 F.3d 609, 613 (6th Cir. 2003).

The district court concluded that there was no merit to the portion of the second claim alleging inconsistent testimony and challenging counsel's failure to impeach the witnesses. Counsel's decision concerning impeachment was a strategic matter entitled to deference. Furthermore, Tucker did not identify any contradictions by the same witness, and the jury had been made aware of discrepancies between the testimony of witnesses. Thus,

the result of the proceeding would not have been different had counsel aggressively impeached the witnesses.

The third claim lacked merit because counsel made strategic decisions not to request an instruction on cross-dressing and not to object to the lack of the promised instruction.

Finally, the claim of cumulative error failed because the Supreme Court has not recognized cumulative error as a basis for habeas relief. *See Lorraine v. Coyle*, 291 F.3d 416, 447 (6th Cir. 2003).

The state filed a notice of appeal with this court, currently pending in Case No. 07-2481. Tucker then filed the instant cross-appeal. After the cases were consolidated and briefed, this court remanded the action to the district court to determine whether a certificate of appealability should issue. The district court then denied a certificate of appealability as to the previously denied claims.

Because Tucker did not file an application for a certificate of appealability following remand, we construe Tucker's brief as such. In his brief, Tucker reasserts only his second claim.

An individual seeking a certificate of appealability is required to make a substantial showing of the denial of a federal constitutional right. *See* 28 U.S.C. § 2253(c)(2); *cf. Barefoot v. Estelle*, 463 U.S. 880, 893 (1983). A petitioner must "sho[w] that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.'" *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (quoting *Barefoot*, 463 U.S. at 893 n.4).

We conclude that Tucker has failed to make a substantial showing. Tucker has abandoned his first, third, and fourth claims by not reasserting them in his brief, and the district court's denial of the remainder of the second claim is not debatable amongst jurists of reason.

Accordingly, we deny the application for a certificate' of appealability.

ENTERED BY ORDER OF THE COURT

Leonard Green

Clerk